85-1109

No.....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

MILWAUKEE COUNTY, WISCONSIN,

Petitioner,

v.

WILLIAM E. BROCK, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does Comprehensive Employment and Training Act ("CETA") § 106(b), which states that the Secretary of Labor "shall" issue a final determination within 120 days of a complaint alleging unlawful use of CETA funds by a grant recipient, bar the Secretary from recovering grant funds when the Secretary fails to issue a final determination within the 120-day period?

2. Did Milwaukee County, as a CETA grantee, violate CETA's prohibition against "the substitution of Federal for other funds in connection with work that would otherwise be performed" by reducing its local expenditures in a county-funded "workfare" program for welfare recipients by wage and hour reductions made in response to *National League of Cities v. Usury*, 426 U.S. 833 (1976), overruled *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005 (1985), and not in anticipation of CETA funding?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Milwaukee County, Wisconsin by Friebert, Finerty & St. John, S.C. its attorneys, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., 1-39) is reported at 771 F.2d 983. The reported opinion reflects an Order (App., 40) dated August 26, 1985, amending the

Slip Opinion. The opinion of the Administrative Law Judge (App., 45-151) is unreported.

JURISDICTION

The judgment of the Court of Appeals (App., 42) was entered on August 6, 1985. The Court of Appeals' order denying petitioner's petition for rehearing and suggestion for rehearing en banc (App., 43) was entered on September 9, 1985. On November 26, 1985, Justice Stevens extended the time within which to file this Petition for Writ of Certiorari to and including January 2, 1986. (App., 164) The jurisdiction in this court rests upon 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 106(b) of the Comprehensive Employment and Training Act, 29 U.S.C. (Supp. V 1981) 816(b), provides in pertinent part:

> Whenever the Secretary receives a complaint from any interested person or organization . . . which alleges, or whenever the Secretary has reason to believe (because of an audit, report, onsite review, or otherwise) that a recipient of financial assistance under this chapter is failing to comply with the requirements of this chapter, the regulations under this chapter or the terms of the comprehensive employment and training plan, the Secretary shall investigate the matter. The Secretary shall conduct such investigation, and make the final determination re-

quired by the following sentence regarding the truth of the allegation or belief involved, not later than 120 days after receiving the complaint. If, after such investigation, the Secretary determines that there is substantial evidence to support such allegation or belief that such a recipient is failing to comply with such requirements, the Secretary shall, after due notice and opportunity for a hearing to such recipient, determine whether such allegation or belief is true.

The following are excerpts from the 1973 Act (Pub. L.No. 93-203, 87 Stat. 839 *et seq.*) pertaining to "maintenance of effort":[1]

§ 703. *Conditions applicable to all programs.* The Secretary shall not provide financial assistance for any program under this chapter unless—

* * *

(7) the program will not result in the displacement of employed workers or impair existing contracts for services or result in the substitution of Federal for other funds in connection with work that would otherwise be performed;

* * *

(11) funds will be used to supplement, to the extent practicable, the level of funds that would otherwise be made available from non-Federal sources for the purpose of planning and administration of programs within the scope of this chapter and not to supplant such other funds;

* * *

---

[1] Cognate statutes and regulations pertaining to individual Titles of CETA and repeating the language of § 703 are contained in the Decision and Order of the Administrative Law Judge (App., 110-113).

STATEMENT

1. The Comprehensive Employment and Training Act (CETA), 29 U.S.C. (Supp. V 1981) 801 *et seq.*, authorized the Secretary of Labor to grant federal funds to qualified entities, principally states or units of local government, for programs "provid[ing] job training and employment opportunities for economically disadvantaged, unemployed, or underemployed persons." 29 U.S.C. (Supp. V 1981) § 801. The statute originally was enacted in 1973 (Pub.L.No. 93-203, 87 Stat. 839 *et seq.*) and was amended substantially in 1978 (Pub.L.No. 95-524, 92 Stat. 1909 *et seq.*). Effective October 18, 1982, CETA was repealed and replaced by The Job Training Partnership Act, 29 U.S.C. 1501 *et seq.* (Pub.L.No. 97-300, § 184 (a)(1), 96 Stat. 1357). However, CETA continues to govern administrative or judicial proceedings pending on October 13, 1982, or begun between October 13, 1982 and September 30, 1984 (29 U.S.C. § 1591(e)).

2. As part of the 1978 CETA amendments, Congress added the 120-day provision set forth in § 106(b) of CETA. (Pub. L.No. 95-524, 92 Stat. 1909 *et seq.*) The Senate Report relating to the 1978 amendments noted, in pertinent part, that: "In some cases grievances have been either ignored, or there have been interminable delays." S.Rep. No. 95-891, 95 Cong., 2nd Sess. 42, *reprinted in* 1978 U.S. Code Cong. and Admin. News at 4522. The Senate Report further stated: "After a complaint is filed the Secretary must make a determination on a complaint on the merits of the case within 120 days" *Id.* at 4523.

3. Questions about the administration of CETA programs by a recipient of CETA funds can be raised by the

Secretary of Labor or by "any interested person or organization" alleging that a recipient of CETA funds is failing to comply with CETA, its implementing regulations, or the terms of the comprehensive employment and training plan. CETA § 106(b), 29 U.S.C. (Supp. V 1981) § 816(b). The same provision then provides that "not later than 120 days after receiving the complaint" the Secretary shall conduct an investigation "and make the final determination as to whether the allegation is true."

4. CETA contained a number of sections, generally referred to as "maintenance of effort" provisions, which required that funds made available through the Act be used in ways that increased employment opportunities without displacing currently employed workers, impairing existing contracts for services, substituting Federal for other funds in connection with work that would otherwise be performed, or supplanting the level of funds that would otherwise be made available from non-Federal sources for the purpose of planning and administration of programs within the scope of the Act. (See, App., 110-113)

5. Petitioner, Milwaukee County, for many years prior to 1977, maintained and funded a work-training program for welfare recipients, known as the Pay for Work Program ("PFWP"). In June, 1977, Milwaukee County started using CETA funds for work training programs for welfare recipients who were not employed within PFWP because of the unavailability of sufficient job slots. Between January and March, 1978, Milwaukee County terminated its PFWP by transferring all its workers into a program known as the Work Assistance Program ("WAP"). In an effort to comply with the main-

tenance of effort provisions, Milwaukee County contributed state and local monies to WAP in addition to the Federal CETA monies used to fund the program. No workers in locally funded PFWP were transferred to the jointly-funded WAP until January, 1978.

6. In 1976, Milwaukee County expended $3,014,580 on PFWP. In 1977, Milwaukee County expended $2,097,428 on PFWP. In 1978, Milwaukee County expended $333,277 on PFWP and $2,399,210 of non-Federal funds on WAP. In each of the years 1979 and 1980, non-federal contributions to WAP were between $4,000,000 and $5,000,000.

7. The instant action arises out of proceedings before the United States Department of Labor ("the Department") initiated by a series of complaints about WAP. The principal complainant was a welfare rights organization known as "The Workfare Coalition" or as "Worker Rights Institute." The initial complaint was dated February 20, 1978, and alleged, *inter alia*, that Milwaukee County's WAP program resulted in a prohibited substitution of Federal funds for non-federal funds. (App. 2, 154) On May 25, 1978, the Workfare Coalition again complained to the Department that WAP resulted in the substitution of Federal funds for other funds. (App. 2, 162)

8. At some time prior to September 11, 1978, the Department commenced an investigation of the complaint against Milwaukee County. On September 11, 1978, Milwaukee County provided to the Department's investigator the PFWP and WAP funding figures stated in paragraph 6 above. Those figures have never been disputed by the Department or the complainants, and they formed the basis for all subsequent decisions concerning substitution

of funds by the Department Grant officer, the Administrative Law Judge, the Secretary, and the Court of Appeals. (App., 124-125)

9. All the complaints against Milwaukee County were investigated by the Grant Officer of the Department's Region V. While the February 20 and May 25, 1978 complaints were being investigated, the Workfare Coalition continued to file new complaints and inquiries on its own behalf and on behalf of many participants in the CETA-funded program. These complaints and inquiries were also directed by the Department to its Region V office. (App., 136-137)

10. The Grant Officer issued his initial determination on all of the complaints, including those concerning substitution of funds on May 29, 1979. The final determination was issued on January 4, 1980, almost two years after the initial complaint about substitution of Federal funds for local funds, more than fifteen months after Milwaukee County provided the Department with the relevant information, and more than nine months after the effective date of the 1978 amendment to CETA requiring the Secretary to make this final determination within 120 days after receiving the complaint.

11. In both the initial and final determinations, the Grant Officer found that Milwaukee County had not substituted Federal funds for local funds, since Milwaukee County spent more non-federal funds in 1978, the year that PFWP was terminated, than in 1977.

12. An ALJ hearing on this issue and a large number of other issues addressed in the initial and final determinations by the Grant Officer was requested by the Workfare Coalition and certain individual complainants.

13. Eight weeks of hearings before the ALJ were conducted between August 4, 1980 and March 13, 1981, on most of the issues raised in the complaints, including the allegation that Milwaukee County had improperly substituted Federal funds for non-federal funds in the WAP. Before the ALJ, Milwaukee County and the Solicitor of Labor, acting as attorney for the Grant Officer, jointly defended the Grant Officer's final determination that Milwaukee County had not violated CETA's prohibition against substitution of Federal funds for local funds, and that the appropriate "base" year for comparing levels of non-federal expenditure was 1977.

14. The ALJ decision was not issued until December 5, 1983. The ALJ, rejecting the arguments both of Milwaukee County and of the Solicitor of Labor attorney representing the Grant Officer, reversed the ruling that Milwaukee County had not substituted Federal funds for local funds and held that the appropriate "base" year for comparison purposes was 1976, not 1977. The ALJ ruled that because Milwaukee County spent $1,199,245 less on its workfare program in 1977 and 1978 than it had in 1976, the County should reimburse the Department $1,199,245.

15. Over $850,000 of the "shortfall" between 1976 County expenditures for PFWP and the expenditures in 1977 and 1978 for PFWP was attributable to wage and hour reductions for PFWP participants undertaken by Milwaukee County in reliance on this Court's then-recent decision in *National League of Cities v. Usury*, 426 U.S. 833 (1976), overruling *Maryland v. Wirtz*, 392 U.S. 183 (1968) and overruled in *Garcia v. San Antonio Metro-*

politan Transit Authority, 105 S.Ct. 1005 (1985). The ALJ specifically found that those reductions were not CETA-related, but rather a response to *National League of Cities.* (App., 129-130). Nonetheless, the ALJ held that Milwaukee County was required to spend in its local workfare program as much non-federal money in 1977 and 1978, after *National League of Cities,* as it had in 1976, before *National League of Cities.*

16. The ALJ also found that Milwaukee County had committed no underfunding of the workfare program in 1979 or 1980 and had in fact contributed between $4,000,000 and $5,000,000 of non-federal funds to the program during each of those years, substantially in excess of the $3,014,580 spent in the comparison year of 1976. (App., 127). Milwaukee County, however, received no credit for these excess contributions against the $1,199,245 liability to the Department.

17. The ALJ determination became the Secretary of Labor's final action on January 4, 1984, pursuant to 29 C.F.R. § 676.91(f) (1983).

18. Petitioner sought judicial review in the Court of Appeals pursuant to 29 U.S.C. (Supp. V 1981) 817. The Court of Appeals denied in part and granted in part the petition for review and ordered the case remanded to the Secretary for further proceedings. With respect to the "substitution of funds" issue, a divided panel of the Court of Appeals affirmed the Secretary's conclusion, with the dissenting judge noting that the majority refused to take into account the fact that the County had reduced PFWP wages and hours solely in response to *National League of Cities.* The dissenter noted that the majority opinion re-

quiring Milwaukee County to spend as much in 1977 and 1978, notwithstanding the cost savings realized solely in response to *National League of Cities*, actually would have required that Milwaukee County increase its effort, not merely maintain it. (App. 34-39)

19. Respecting the effect of the statutory and regulatory requirement that the Secretary issue his final determination within 120 days, the Court of Appeals held that the requirement was not "jurisdictional." (App. 4-15)

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REASONS FOR GRANTING THE PETITION

A. Conflict in the Circuits.

The decision of the Court of Appeals below, holding that § 106(b) of CETA is not jurisdictional, and the decision in *St. Regis Mohawk Tribe v. Brock*, 769 F.2d 37 (2d Cir. 1985), squarely conflict with the decisions in *Pierce County v. United States Department of Labor*, 759 F.2d 1398 (9th Cir.), *cert. granted*, 106 S.Ct. 308 (Nov. 4, 1985) (No. 85-395), *City of Edmonds v. United States Department of Labor*, 749 F.2d 1419 (9th Cir. 1984), and *Lehigh Valley Manpower Program v. Donovan*, 718 F.2d 99 (3d Cir. 1983). This jurisdictional question over which the circuits are in conflict was the sole issue raised by the Secretary of Labor in his petition for a writ of certiorari in the *Pierce County* case, and the Secretary relied extensively on the decision of the Seventh Circuit in this case to support his petition. By granting certiorari in the

Pierce County case, this Court has already determined that the question over which the Courts of Appeals have split is worthy of certiorari review.

Moreover, the decision below is wrongly decided because it interprets § 106(b) in a manner that is contrary to the express language of the statute and that weakens the strong incentive Congress intended to give the Secretary of Labor to resolve promptly those cases awaiting final determinations. The decision is also contrary to a long line of cases holding that administrative agencies must stay within the confines of the powers granted to them by statute.

1. The language of the 120-day provision is unequivocally mandatory, requiring that the Secretary "*shall* . . . make the final determination . . . not later than 120 days after receiving the complaint." (emphasis added). The Courts in *City of Edmonds v. United States Department of Labor*, 749 F.2d 1419 (9th Cir. 1984) and *Lehigh Valley Manpower Program v. Donovan*, 718 F.2d 99 (3d Cir. 1983) found the plain meaning of this language to be mandatory and jurisdictional. Even the court below grudgingly concedes that § 106(b) "seems to require a 'final determination' within 120 days of the receipt of the complaint". (App., 6) As the Court of Appeals noted in *City of Edmonds*, a statute should be "construed according to the plain meaning of the words used by Congress, 'absent a clearly expressed legislative intention to the contrary.' *Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)." 749 F.2d at 1421.

2. There is no such "clearly expressed legislative intention" to construe "shall" in § 106(b) as anything oth-

er than mandatory and binding on the Secretary. In reaching a contrary conclusion, the court below relied principally upon the remarks of Congressman Obey, who introduced the 120-day provision as an amendment during the floor debates over the 1978 amendments to CETA. (App. 6-7) The Court of Appeals for the Ninth Circuit in *City of Edmonds* considered Congressman Obey's remarks, but noted that the Joint Explanatory Statement of the Conference Report makes no reference to Congressman Obey's floor-debate comments and that the Conference Report, which was written after Congressman Obey's comments, "construed the proposed final draft of the statute to require that the Secretary 'must' make a final determination within 120 days." 749 F.2d at 1422. The court also noted, as this Court observed in *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979) that the "remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." 749 F.2d at 1422.

3. Moreover, the Senate Report on the 1978 CETA Amendments shows that Congress was concerned that the Department was too slow in rectifying alleged abuses in CETA programs: "In some cases grievances have either been ignored, or there have been interminable delays." S. Rep. 95-891 95th Cong. 2nd Sess. (1978). Giving a jurisdictional effect to the 120-day provision, thereby creating an incentive to insure prompt action by the Secretary, is entirely consistent with this legislative concern.

4. The decision of the court below is too broad because it fails to give binding effect to the 120-day provision of § 106(b) even where the relief sought does not run in favor of an aggrieved complainant, but rather to the De-

partment itself. It may be appropriate to find the 120-day provision not to preclude relief, for example, where a complainant alleges an improper termination from a CETA program and seeks reinstatement and back pay, but to give the provision preclusive effect where the Department seeks to disallow costs incurred due to a substitution of federal for local funds, as was alleged in this case. Indeed, the illustrations used by the court below to support its interpretation of the 120-day provision are those of program participants seeking individual relief, rather than cost disallowances by the Department. The court raises the specter of the Department having the power of "pocket dismissal" of an aggrieved *participant's* complaint. (App., 8-9) The court speaks of the "paradoxical hardship on *claimants* by destroying their claims if the Secretary does not act expeditiously." (App., 11) Moreover, the court distinguished this Court's decision in *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980) because the statutory time limit there—42 U.S.C. § 2000e-5(e)—dealt with "the filing of a charge by an aggrieved employee, which does not correspond to the situation presented by CETA § 106(b), where the *claimants* have filed a timely claim and only the decisionmaker is responsible for the delay." (emphasis added) (App., 13-14) Although the complainants in this case alleged a substitution of Federal for local funds, relief for such a violation does not run in favor of the individual complainants, but rather in favor of the Department. Given Congress' purpose to insure prompt resolution of complaints by the Department, it is entirely consistent with legislative intent to give the mandatory language of § 106(b) preclusive effect where the relief sought runs in favor of the Department.

5. Finally, as noted by the Third Circuit Court of Appeals in *Lehigh Valley Manpower Program v. Donovan*, 718 F.2d 99 (3d Cir. 1983), since the Department incorporated the 120-day limit into its own regulations, (*see* 20 C.F.R. §§ 676.86(a)(1), (c), 676.88(e) (1982), the Department is bound by its own rules. 718 F.2d at 101-102. The court below did not dispute that the Department had violated its own procedural rule by failing to comply with the 120-day provision, but would have found the regulation invalid as inconsistent with its statutory source if it were read as barring relief against grantees. (App., 13)

6. At least in those instances where the Department seeks relief on its own behalf, as distinct from relief in favor of program participants, a regulation adopted by the Secretary imposing on the Department a jurisdictional requirement would not be contrary to § 106(b) of the Act in view of the aforementioned congressional purpose of assuring prompt resolution of complaints.

B. The Decision Below Raises Significant and Recurring Problems Concerning Compliance by State and Local Governments with Federal "Maintenance of Effort" Requirements.

The Seventh Circuit's decision in this case raises important and recurring problems concerning compliance by State and local governments with "maintenance of effort" requirements in Federal grant programs. Definitive guidelines should be provided by this Court for the proper application of statutes prohibiting the substitution of Federal for non-Federal funds so that both Federal grantors and State and local grantees may properly implement statutory requirements. The problem addressed in the deci-

sion below is very likely to be a recurring one, since there are a great many Federal assistance programs which prohibit the substitution of Federal for non-Federal funds for program purposes, and fluctuations in levels of local spending are commonplace. By using as its base of comparison, without statutory warrant, County expenditures during the year preceding the use of CETA funds, rather than during the year when CETA funds were first spent by the County, and by ignoring the effect of local savings attributable to wage and hour reductions implemented in reliance upon *National League of Cities v. Usury, supra*, the Seventh Circuit has transmuted common statutory language intended to require maintenance of effort into a requirement to increase effort.

A great number of Federal grant programs designed for participation by State and local governments have statutory restrictions requiring the State or local grantee to use the Federal funds to supplement, rather than supplant, the state and local level of funding that would otherwise be devoted to program purposes. The statutory sources of these programs are most commonly found in Title 20 (Education)[2] and Title 42 (The Public Health and

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[2] *See*, e.g., 20 U.S.C.A. § 1413(a)(9) (Pub.L. 91-230, Title VI, § 613, Apr. 13, 1970, 84 Stat. 179; Pub.L. 94-142, § 5(a), Nov. 29, 1975, 89 Stat. 782) (Federal assistance for education of handicapped children); 20 U.S.C.A. 2323(b)(16) (Pub.L. 88-210, Title I, § 113, as added Pub.L. 98-524, § 1, Oct. 19, 1984, 98 Stat. 2445) (Federal assistance for vocational education); 20 U.S.C.A. § 3231(f)(4) (Pub.L. 89-10;Title VII, § 721, as added Pub.L. 98-511, Title II, § 201, Oct. 19, 1984, 98 Stat. 2374) (Federal assistance for bilingual education).

Welfare)[3] of the United States Code. Although a few of the statutes provide express standards for determining whether a grantee has maintained the required level of non-federal funding,[4] the vast majority of the statutes simply provide that the grant recipient must use the Federal monies to supplement rather than supplant non-federal funding or, as with 29 U.S.C. § 703(7), prohibit the substitution of Federal funds for non-Federal funds. A number of Federal grant programs intended to create employment opportunities or to enhance the employability of certain target populations contain statutory maintenance of effort restrictions that are identical to the CETA restrictions that Milwaukee County was found to have violated, i.e., "the substitution of Federal funds for other funds in connection with work that would otherwise be performed." These include the Community Service Employment Pilot Program for Handicapped Individuals, 29

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[3] *See, e.g.*, 42 U.S.C.A. § 5103(b)(2)(H) (Pub.L. 93-247, Jan. 31, 1974, 88 Stat. 5) (child abuse prevention and treatment); 42 U.S.C.A. § 5301(c) (Pub.L. 93-383, Title I, § 101, Aug. 22, 1974, 88 Stat. 633) (housing and community development); 42 U.S.C.A. § 6948(b) (Pub.L. 89-272, Title II, § 4008, as added Pub.L. 94-580, § 2, Oct. 21, 1976, 90 Stat. 2818) (solid waste disposal); 42 U.S.C.A. § 9835(c) (Pub.L. 97-35, Title VI, § 640, Aug. 13, 1981, 95 Stat. 499) ("Head Start" program); 42 U.S.C.A. § 10603(a)(2)(b) (Pub.L. 98-473, Title II, § 1403, Oct. 12, 1984, 98 Stat. 2171) (crime victim assistance); 42 U.S.C.A. § 10706(d)(1) (Pub.L. 98-620, Title II, § 207, Nov. 8, 1984, 98 Stat. 3342) (State Justice Institutes).

[4] *See, e.g.*, 20 U.S.C.A. § 1206(b)(1) (Pub.L. 89-750, Title III, § 307, Nov. 3, 1966, 80 Stat. 1219, as amended Pub.L. 95-561, Title XIII, § 1306, Nov. 1, 1978, 92 Stat. 2359) (adult basic education); 20 U.S.C.A. § 2736(a)(1) (Pub.L. 89-10, Title I, § 126, as added Pub.L. 95-561, Title I, § 101(a), Nov. 1, 1978, 92 Stat. 2168) (special educational needs of children).

U.S.C.A. § 795(b)(1)(E)[5]; the Older American Community Service Employment Program, 42 U.S.C.A. § 3056(b)(1)(E)[6]; and Community Economic Development Ubran & Rural Special Impact Programs, 42 U.S.C.A. § 9807(a)(10)[7].

Among the questions that are necessarily implicated by these statutes but for which the statutes themselves provide no guidance are:

(1) What are the appropriate periods of time to compare levels of State or local spending?

(2) Under statutes like 29 U.S.C.A. § 703(7), which prohibit the substitution of Federal for non-Federal funds "in connection with work that would otherwise be performed," may a State or local grantee reduce non-Federal program expenditures, without violating the statute, so long as no work or worker is affected by the spending reduction?

(3) To what extent, if any, should State or local grantees of Federal assistance be permitted to effect reductions in non-Federal spending levels, unrelated to the availability of Federal funds?

(1) Base of Reference for Comparison.

The Seventh Circuit rejected Petitioner's argument that 29 U.S.C.A. § 703(7) could not be violated so long as the level of local spending after the inception of the CETA funded program was not less than the level of local spend-

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[5] Pub.L. 93-112, Title VI, § 611, as added Pub.L. 95-602, Title II, § 201, Nov. 6, 1978, 92 Stat. 2989.

[6] Pub.L. 89-73, Title V, § 502, formerly Title IX, § 902, as added Pub.L. 94-135, Title I, § 113(a), Nov. 28, 1975, 89 Stat. 720.

[7] Pub.L. 97-35, Title VI, § 618, Aug. 13, 1981, 95 Stat. 491.

ing at the time the CETA monies were first committed or spent by Milwaukee County. When Federal assistance first becomes available in the middle or toward the end of a year during which a State or local government has reduced its local expenditures from the preceding year, not in anticipation of Federal funding, the Seventh Circuit approach will deter eligible grantees from participating in the assistance program during that year, since acceptance of the Federal assistance will trigger a disallowance of costs equal to the difference in program expenditures between the first year of Federal assistance and the preceding year, whether the spending reductions are attributable to the availability of Federal assistance or not. Indeed, it may be expected that those State and local governments most in need of Federal assistance for certain programs, because of substantial spending cuts unrelated to the availability of Federal assistance, will be most hurt by the Seventh Circuit's approach to "maintenance of effort". This in turn will frustrate Congressional purpose in making the Federal assistance available in the first instance.

An approach that is less arbitrary, more rational and consistent with Congressional purpose is to compare the grantees' non-Federal spending after the receipt of Federal assistance with the level that existed at the time of receipt, not with the level of spending a year before. The decision of the Seventh Circuit will require State and local grantees to increase their program expenditures in the initial year of Federal assistance over what would otherwise be spent in the absence of Federal assistance.

(2) Meaning of "work that would otherwise be performed."

The majority opinion below denigrated the significance of the reference in 29 U.S.C. § 703(7) to "work that would otherwise be performed" by holding Milwaukee County liable for expenditure decreases which were unrelated to CETA funding and which had no effect on *work* that was being performed at the time the CETA-funded program began. Even though Milwaukee County did not discharge, lay-off or reduce the hours of any of its locally-funded welfare recipients upon the creation of the supplementary CETA-funded "workfare" program, the majority opinion below held the County liable simply for its failure to spend as much local money in its program as it had during the year preceding the creation of the CETA-funded program. This approach makes the words "in connection with work that would otherwise be performed" meaningless. Indeed, as the dissenter below pointed out, the panel majority has effectively transmuted a "maintenance of effort" statute into an "enhancement of effort" statute.

Unless reversed or clarified by this Court, the decision below will have a chilling effect on State and local participation in Federal work-related grant programs during any year in which, for any legitimate reason, the potential grantee has substantially reduced its level of expenditures from the preceding year. It is important to note that neither the Secretary nor the Seventh Circuit majority below found that Milwaukee County had reduced its expenditures "in anticipation of" Federal assistance but rather that it had substituted Federal for non-Federal funds "in connection with work that would otherwise be per-

formed." Thus, regardless of the reason for local spending reductions, a state or local government which initiates participation in a Federal work program during a year of reduced spending but not reduced work, will do so at the risk of being found to have substituted funds "in connection with work that would otherwise be performed."

(3) Effect of Cost-Efficiencies

By adopting an approach to determining maintenance of effort violations that ignores the reasons for decreases in local program spending from year to year and that ignores the effects of cost efficiencies on program operations, the decision below will operate to discourage that which should be encouraged: legitimate reductions in state and local government spending levels not attributable in fact to the availability of Federal assistance. With the advantage of hindsight, it is clear that Milwaukee County's mistake, if there was one, was in creating a program for CETA-eligible welfare recipients akin to its locally-funded program in the middle of a year when local expenditures were below the previous year's, in large measure due to savings realized after this Court decided *National League of Cities v. Usury, supra.* As the dissenting opinion below pointed out, by requiring that these savings be reimbursed to the Federal government, "the majority decision penalizes a community that effectuated cost-saving and cost-efficient programs for the benefit of welfare recipients and taxpayers as well." (App., 39) Focusing as it does exclusively on comparative annual expenditures, the decision below vitiates the normal incentives to increasing productivity and cost-effectiveness for state and local governments participating in the manifold Federal

assistance program requiring maintenance of effort. It is hard to believe that this is what Congress intended by prohibiting "the substitution of Federal for non-Federal funds in connection with work that would otherwise be performed."

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision and opinion of the Seventh Circuit.

Respectfully submitted,

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December, 1985

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

—o—

No. 84-1067

MILWAUKEE COUNTY, WISCONSIN,

Petitioner,

v.

WILLIAM E. BROCK, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR,

Respondent.

—o—

Petition for Review of an Order of the United States Department of Labor

—o—

ARGUED SEPTEMBER 20, 1984—DECIDED AUGUST 6, 1985*

—o—

BEFORE ESCHBACH and COFFEY, *Circuit Judges*, and GRANT, *Senior District Judge*.**

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* On July 17, 1985, while a draft of this opinion was being circulated among all of the judges of this court in regular active service pursuant to Circuit Rule 16(e) because Section II had created a conflict with the decision of the United States Court of Appeals for the Third Circuit in *Lehigh Valley Manpower Program v. Donovan*, 718 F.2d 99 (3d Cir. 1983), and that of the United States Court of Appeals for the Ninth Circuit in *City of Edmonds v. United States Department of Labor*, 749 F.2d 1419 (9th Cir. 1984), the United States Court of Appeals for the Second Circuit issued its opinion in *St. Regis Mohawk Tribe, New York v. Brock*, No. 85-4042 (2d Cir. July 17, 1985) (Friendly, J.), in which it held that the 120 day limitation of CETA § 106(b) was not jurisdictional. The Rule 16(e) submission was, therefore, withdrawn.

** The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, sitting by designation.

ESCHBACH, *Circuit Judge*. This dispute arises out of the development and administration by Milwaukee County, Wisconsin ("County" or "Petitioner") of programs funded under the Comprehensive Employment and Training Act ("CETA" or "Act"), 29 U.S.C. §§ 801-999 (Supp. II 1978). The County petitions for review of an order of the Secretary of the United States Department of Labor ("Secretary") in which it was determined, *inter alia*, that (1) in 1977 and 1978, the County has substituted approximately $1.2 million in federal CETA funds for County funds in violation of CETA "maintenance of effort" requirements; (2) the County, because of a violation of CETA wage and benefit regulations, was required to perform a record review and provide backpay and benefits to former participants; (3) costs associated with 17 ineligible CETA participants would be disallowed; and (4) a former County employee was entitled to backpay for wrongful discharge. In addition, the County now argues that the Secretary was barred from ordering relief because he failed to observe the statutory time limits for the processing of claims against CETA grantees. For the reasons stated below, we grant in part and deny in part the petition for review.

I. Procedural History

This action arose from the consolidation of a series of complaints filed with the United States Department of Labor ("DOL"). The first written complaint was received by the DOL in February 1978. A second letter of complaint, containing 57 issues and signed by 22 persons, was received in May 1978. Most of the matters raised in the initial complaint were alleged in more detail in the second complaint. A third complaint in December 1979 added 16

new allegations. Two additional and independent complaints were filed in May 1978 and Janaury 1980. These five complaints were subsequently consolidated with other individual complaints.

The Grant Officer issued his initial determination on May 29, 1979. In response to a hearing request from the representative of one of the parties filed on December 11, 1979, the Office of the Administrative Law Judges ordered the Grant Officer to provide his final determination by December 30; the final determination was in fact issued on January 4, 1980.

Hearings before the ALJ began on August 4, 1980, and were concluded on March 13, 1981, with the ALJ issuing his decision on December 5, 1983. This petition for review followed.[1]

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[1] The statutory source of our jurisdiction is 29 U.S.C. § 817(a) (Supp. II 1978). The decision of the ALJ became the final decision of the Secretary under 20 C.F.R. § 676.91(f) (1983).

CETA was originally enacted in 1973 as Pub. L. No. 93-203, 87 Stat. 839, amended in 1974 by Pub. L. No. 93-567, 88 Stat. 1845, in 1976 by Pub. L. No. 94-444, 90 Stat. 1476, and in 1977 by Pub. L. No. 95-93, 91 Stat. 627, and substantially revised in 1978 by Pub. L. No. 95-524, 92 Stat. 1909. The Act was repealed, effective October 13, 1982, by § 184 of the Job Training Partnership Act ("JTPA"), Pub. L. No. 97-300, 96 Stat. 1322, 1357 (1982). However, JTPA § 181(e), 96 Stat. 1355, 29 U.S.C. § 1591(e), provides that the new legislation "shall not affect administrative or judicial proceedings pending on [October 13, 1982], or begun between [October 13, 1982,] and September 30, 1984, under [CETA]."

Because the events that gave rise to this petition for review occurred before the effective date of the 1978 CETA amendments, the substantive provisions of the 1973 version of the Act, as amended prior to 1978, govern the resolution of this case. Unless otherwise noted, however, the procedural and remedial aspects of this action are controlled by the Act as amended in 1978.

II. Jurisdiction

Before considering the merits of the Secretary's order, we address the threshold argument presented by Petitioner that, because the "final determination" of the Grant Officer was not issued within 120 days of the receipt of the initial complaint, the Secretary was divested of jurisdiction under § 106(b) of the Act, 29 U.S.C. § 816(b) (Supp. II 1978), and, therefore, was "barred from recovering against the petitioner." After a thorough examination of the language of § 106(b), its legislative history, and the general purpose behind the 1978 amendments to the Act, we conclude that the 120-day limit of § 106(b) is not jurisdictional and, therefore, that the Secretary had the authority to proceed against Petitioner.[2]

We would initially note the well-established canon of construction that a single provision will not be interpreted

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[2] In the context of this opinion, the term "jurisdictional" refers to a statutory requirement that, if not complied with by the agency, would divest that agency of all power to act on the matter and that would not allow for any consideration of, for example, equitable exceptions or prejudice to the litigants. A parallel in federal litigation would be a requirement (such as diversity) necessary to the district court's subject-matter jurisdiction.

The term "mandatory" refers to a statutory requirement that the agency should attempt to comply with as a matter of course; however, the failure to comply does not automatically divest the agency of power to act, but may provide the litigants with, for example, the right to compel the agency to act. *Cf.* 5 U.S.C. § 706.

The term "directory" refers to a statutory provision that is hortatory only and thus confers no right on the litigants to compel agency action.

Under the facts of this case, we need only determine whether § 106(b) is "jurisdictional" and, therefore, we express no opinion on the question whether this provision is either "mandatory" or "directory."

so as to defeat the general purpose that animates and informs a particular legislative scheme. *See Bob Jones University v. United States,* 461 U.S. 574, 586, 103 S. Ct. 2017, 2025-2 (1983); *United States v. American Trucking Associations, Inc.,* 310 U.S. 534, 543-44, 60 S. Ct. 1059, 1063-64 (1940). We, of course, do not substitute our judgment for that of Congress, but merely attribute to that legislative body a general overriding intent to avoid results that would undermine or vitiate the purposes of specific provisions. *Cf. Sorrells v. United States,* 287 U.S. 435, 447, 53 S. Ct. 210, 214 (1932).

In addition, it is beyond dispute that the 1978 amendments to the Act were "remedial" in nature, in that they were intended to give the Secretary greater power to prevent and correct the fraud and abuse that had developed in CETA programs. *See* S. Rep. No. 891, 95th Cong., 2d Sess. 42-43 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 4480, 4522-23; H.R. Rep. No. 1124, 95th Cong., 2d Sess. 3, 5-6, 13 (1978); 124 Cong. Rec. 27,789 remarks of Sen. Bellmon), 27,223 (remarks of Sen. Nelson), 25,183 (remarks of Rep. Myers), 25,182 (remarks of Rep. Lehman) 25,168 (remarks of Rep. Hawkins) (1978); *see also* 18 U.S.C. § 665; 29 U.S.C. §§ 816(d)(1), (e), (f), 825(g), 836 (Supp. II 1978). We acknowledge, of course, that the term "remedial" does not have talismanic significance in the construction of legislation. *Cf. Zimmerman v. North American Signal Co.,* 704 F.2d 347, 353 (7th Cir. 1983). It does, however, affect the presumptions to be employed. With reference to the 1978 CETA amendments, we must in doubtful situations indulge in a presumption in favor of the Secretary's jurisdiction and will construe the Act accordingly.

Section 106(b) provides in relevant part:

Investigation Of Complaints By Secretary

> Whenever the Secretary receives a complaint from any interested person or organization . . . which alleges, or whenever the Secretary has reason to believe . . . that a recipient of financial assistance under this chapter is failing to comply with the requirements of this chapter, the regulations under this chapter or the terms of the comprehensive employment and training plan, the Secretary shall investigate the matter. The Secretary shall conduct such investigation, and make the final determination required by the following sentence regarding the truth of the allegation or belief involved, not later than 120 days after receiving the complaint. If, after such investigation, the Secretary determines that there is substantial evidence to support such allegation or belief that such a recipient is failing to comply with such requirements, the Secretary shall, after due notice and opportunity for a hearing to such recipient, determine whether such allegation or belief is true.

It should be noted that § 106(b), when read as a whole, is opaquely written and that the second sentence of the provision, when considered in isolation, seems to require a "final determination" within 120 days of the receipt of the complaint. It should also be noted that § 106(b) does not expressly address the situation presented in the instant case, *i.e.*, the timing requirements for the final determination after the consolidation of numerous related complaints.

The second sentence did not in fact appear in the original bill, but was proposed by Congressman Obey and added as an amendment during the floor debates on the 1978 amendments to the Act. 124 Cong. Rec. 25,230-31 (1978). The Obey amendment actually contained two

separate provisions. The first required that the prime sponsor reach a decision on a grievance within 60 days after the filing of the grievance; the second was the 120-day provision at issue in the instant dispute. After the reading of the amendments, the following colloquy occurred:

> Mr. OBEY. Mr. Chairman, I understand this amendment will be accepted by the committee. It is a very simple amendment. All it does is put a specific period of time in the bill during which the prime sponsor must answer a complaint lodged against it for violations of the conditions under which the CETA program exists in the first place, and also it establishes a 120-day time limit on the time during which the Labor Department can consider a complaint before it has to proceed.
>
> . . . .
>
> Mr. HAWKINS [sponsor of original bill]. Mr. Chairman, we have seen the amendment. We accept the amendment.
>
> If [Mr. OBEY] would further yield, do I understand from [him] that if the determination is not made in a specified time it shall not affect the Secretary's jurisdiction in the matter?
>
> Mr. OBEY. That is correct.
>
> Mr. HAWKINS. With that understanding we do accept the amendment.

Id.

Thus, it is clear from this exchange that the author of the 120-day provision and the sponsor of the original bill did not consider it jurisdictional in any way. Of course, these statements are not controlling; nevertheless, we find them highly persuasive. They were made by the

author of the amendment and the sponsor of the original bill on the floor of the House during debates on the bill. In addition, no contrary view of the jurisdictional effect of the amendment was expressed, no objection was voiced, and nothing in the record indicates that Congress may have had an intent different from that expressed in this exchange.

We also find further support for our position in the general purposes of the 1978 amendments to the Act.[3] To ensure that CETA funds would not be diverted from their intended purposes, Congress sought to grant the Secretary "maximum authority to protect the integrity of the program." S. Rep. No. 891, *supra*, at 21, *reprinted* in 1978 U.S. Code Cong. & Ad. News at 4501. It is also evident that Congress was aware that the DOL commanded insufficient resources to handle CETA investigations and that there was a backlog in the Department. *See id.* at 42, *reprinted* in 1978 U.S. Code Cong. & Ad. News at 4522; H.R. Rep. No. 1124, 95th Cong., 2d Sess., 3, 5-6, 13; *see also* 124 Cong. Rec. 31,021 (1978) (remarks of Rep. Maguire); *id.* at 31,026 (remarks of Rep. Collins). Thus, it would indeed be incongruous to conclude that Congress would have the Secretary divested of jurisdiction under § 106(b) when he does not render his final determination within four months of the receipt of the complaint. *Cf. Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 369-71, 97 S. Ct.

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[3] The congressional reports that refer specifically to the 120-day limit of the 1978 amendments are unilluminating, as they merely track the language of § 106(b) and offer no elaboration. *See* S. Rep. No. 891, 95th Cong., 2d Sess. 43, 80 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 4480, 4523, 4560; H.R. Conf. Rep. No. 1765, 95th Cong., 2d Sess. 123 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 4581, 4588.

2447, 2456-57 (1977). In addition, such an interpretation would, in effect, give the DOL the power of "pocket dismissal (analogous to the President's "pocket veto"), a power entirely inconsistent with the duty to ferret out fraud and abuse in the CETA system. Furthermore, the argument for a jurisdictional bar is weakened by the fact that the Act does not specify the consequences of the Secretary's failure to comply with the 120-day limit. *See Thomas v. Barry*, 729 F.2d 1469, 1470 n.5 (D.C. Cir. 1984); *Usery v. Whitin Machine Works, Inc.*, 554 F.2d 498, 501 (1st Cir. 1977); *Tri-State Bancorporation, Inc. v. Board of Governors*, 524 F.2d 562, 565-66 (7th Cir. 1975); *Fort Worth National Corp. v. Federal Savings & Loan Insurance Corp.*, 469 F.2d 47, 58 (5th Cir. 1972); *cf. Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393-94, 102 S. Ct. 1127, 1132-33 (1982).

The instant case vividly illustrates why the 120-day limit cannot be construed as jurisdictional. Counsel for Respondent informed this court at oral argument that this was the most elaborate and time-consuming CETA dispute to date. As noted above, the Grant Officer was confronted with over seventy separate "counts" derived from a series of complaints that were filed over an approximately two-year period. Of course, the proceedings before the ALJ are not included in the 120-day period.[4]

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[4] It should be noted that, under CETA § 106(b) and 20 C.F.R. § 676.86 (1984), the 120-day period begins to run from the date the Grant Officer receives a complaint filed after the exhaustion by the complainant of local administrative remedies. This initial complaint, of course, may be amended, clarified, or amplified at any time during the proceedings and such modifications

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We will refer to them, however, as they illustrate the complexity of this dispute. Petitioner described the hearing before the ALJ as follows: "This case, as presented to the ALJ, involved a great number of issues. Thirty-nine days were spent in evidentiary hearings, approximately 9,000 pages of transcript were generated, and hundreds of exhibits were offered and received." Petitioner's Brief at 4. The ALJ described the allegations presented as an "almost unmanageable conglomerate mass." *See also* Petitioner's Appendix at 68-69 (ALJ's discussion of complexity of dispute and reasons for Grant Officer's delay). His final order covered eighty single-spaced typewritten pages. The requirement of a final determination from the

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relate back to the original filing date, 20 C.F.R. § 676.86(b)(7). The Grant Officer must first investigate the complaint and then issue an "Initial Determination" that there is or is not sufficient evidence to support the allegations of the complaint, *id.* § 676.86(c), § 676.88(a), (b); *see also id.* § 686.86(d)-(h). In this case, for example, the Grant Officer was obliged to conduct a lengthy investigation, which included interviews with approximately 67 individuals.

An opportunity for an informal resolution must then be provided, *id.* § 676.88(d). If the parties cannot resolve the dispute, the Officer must then issue a "Final Determination," which shall (1) indicate the efforts undertaken to resolve informally the matters contained in the initial determination, (2) list those matters upon which the parties continue to disagree, (3) list any sanctions and required corrective actions, and (4) inform the parties of their opportunity to request a hearing before an ALJ, *id.* § 676.88(e). It is this document that constitutes the "final determination" required within 120 days under § 106(b). *See* 20 C.F.R. § 676.86(a)(1); *cf. id.* § 676.86(a)(2). Thus, the final-determination process "consists of the non-criminal investigation, the determination of substantial evidence (either supporting or not supporting the allegations of the complaint . . .), and the procedures regarding notice, informal resolution or lack of informal resolution, and notice of opportunity for hearing," *id.* § 676.86(a)(1), under the Act, but does not include subsequent proceedings before the ALJ.

Grant Officer in 120 days under these facts would be a practical impossibility at best, and the effect of such a construction would be to remove completely disputes of this kind from the Secretary's jurisdiction and to extinguish absolutely the claims of innocent complainants, even though they were in no way untimely or at fault in initiating the action.

Thus, we conclude that the 120-day limit is not jurisdictional, for such a construction would be inconsistent with the purpose of the 1978 amendments and would frustrate the intent of Congress to accord the Secretary "maximum authority" to control abuse and fraud in CETA programs. In addition, we believe that the 120-day limit was intended to benefit claimants by ensuring that their claims would be resolved expeditiously. If jurisdictional, the limit would impose a paradoxical hardship on claimants by destroying their claims if the Secretary does *not* act expeditiously. In effect, timely claims would be defeated by the Secretary's failure or inability to process those claims. Our conclusion is not only supported by the specific circumstances of the 1978 CETA Amendments, but also by the general rule that agency action should not be set aside for delay, *see, e.g., NLRB v. International Association of Bridge, Structural & Ornamental Ironworkers,* — U.S. —, 104 S. Ct. 2081 (1984) (Administrative Procedure Act and National Labor Relations Act); *NLRB v. J.H. Rutter-Rex Mfg. Co.,* 396 U.S. 258, 263-66 & n.3, 90 S. Ct. 417, 420-21 & n.3 (1969) (same); *Garvey Grain Co. v. Director,* 639 F.2d 366, 368 n.3, 372 (7th Cir. 1981) (Longshoremen's and Harbor Workers' Compensation Act); *Ralpho v. Bell,* 569 F.2d 607, 626-28 (D.C. Cir. 1977) (Micronesian Claims Act of 1971); *Usery v. Whittin Ma-*

chine Works, Inc., 554 F.2d 498, 501-03 (1st Cir. 1977) (Trade Act of 1977); *see also Chromcraft Corp. v. EEOC*, 465 F.2d 745 (5th Cir. 1972) (Administrative Procedure Act); *cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S. Ct. 1148 (1982); *In re Grand Jury Proceedings*, 757 F.2d 108, 110-12 n.1 (7th Cir.) (30-day limit of 28 U.S.C. § 1826(b) not jurisdictional), *cert. denied*, — U.S. —, 105 S. Ct. 2025 (1985), as the contrary rule would place the adverse consequences on the specific beneficiaries of the legislation and on federal taxpayers generally and would allow the alleged wrongdoer to escape liability merely because of a procedural default on the part of the agency.

We note that the Court of Appeals for the Third Circuit, in *Lehigh Valley Manpower Program v. Donovan*, 718 F.2d 99 (3d Cir. 1983), has considered the effect of the Grant Officer's failure to comply with the 120-day limit of § 106(b). Although it did not expressly denominate § 106(b) as "jurisdictional," the Third Circuit did hold that the Grant's Officer's failure to comply with that provision divested the Secretary of all power to act and that the question of prejudice to the litigants was irrelevant. The Secretary's order was then set aside. Thus, in the context of this decision, *see supra* note 2, the court in *Lehigh* construed § 106(b) as "jurisdictional." Given our own independent analysis of the question, we decline to follow the *Lehigh* decision.

The Third Circuit examined the language of § 106(b), but did not consider its legislative history or the general purpose of the 1978 amendments, even though the court acknowledged that the "[i]nsertion of the Obey amendment . . . result[ed] in a somewhat garbled provision." 718 F.2d at 101. In addition, the court placed great weight on

the DOL's incorporation of the 120-day limit into the CETA regulations. *See e.g.*, 20 C.F.R. §§ 676.86(a)(1), (c), 676.88(e) (1983). The agency, according to the Third Circuit, was bound by its own procedural rules. This is, of course, usually the case, but the threshold question, which the court in *Lehigh* did not exhaustively examine, is whether the regulations were consistent with their statutory source, as it is the enabling legislation that determines the scope of any corresponding regulatory provision.[5]

More recently, the Court of Appeals for the Ninth Circuit, in *City of Edmonds v. United States Department of Labor*, 749 F.2d 1419 (9th Cir. 1984), has expressly held that § 106(b) is jurisdictional. *See also Pierce County v. United States*, 759 F.2d 1398 (9th Cir. 1985). For the most part, the court in *Edmonds* simply adopted the reasoning of the *Lehigh* decision. In addition, the court in *Edmonds*, focusing on the use of the word "shall" in § 106(b), conclude that this term was generally "mandatory" and stated that there was no reason to depart from this interpretation.

The court relied in part in reaching its conclusion on the Supreme Court's decision in *Mohasco Corp. v. Silver*, 447 U.S. 807, 100 S. Ct. 2486 (1980), which construed the use of the term "shall" in 49 U.S.C. § 2000e-5(c) and (e) to

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[5] As indicated in the text, after our own independent analysis, we have concluded that § 106(b) is not jurisdictional. If 20 C.F.R. §§ 676.86 and 676.88 could only be read as imposing a jurisdictional requirement, we would also find that they contravene § 106(b) and were, therefore, invalid. However, as these regulations merely follow the language of the statute, they must be construed as imposing a time limit that is no more onerous than that of § 106(b) itself. Thus, the Grant Officer's failure to comply with the DOL's regulations did not divest the Secretary of jurisdiction.

impose a mandatory requirement of filing a charge with the EEOC within the statutory time limits. We, of of course, can distinguish *Mohasco* on the ground that § 2000e-5(e) deals with the filing of a charge by an aggrieved employee, which does not correspond to the situation presented by CETA § 106(b), where the claimants have filed a timely claim and only the decisionmaker is responsible for the delay. However, cases subsequent to *Mohasco* provide a definitive response to the *Edmonds* decision. It is true that the Court in *Mohasco* found the filing requirement to be mandatory. It does not follow, however, that all "mandatory" requirements are "jurisdictional." The *Mohasco* decision itself is ambiguous on the jurisdictional question. *Compare* 447 U.S. at 811-12, 100 S. Ct. at 2490 *with id.* at 811 n.9, 100 S. Ct. at 2490 n.9. Any questions concerning the character of § 2000e-5(e), however, were unequivocally dispelled in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S. Ct. 1127, 1132 (1982), in which the Supreme Court held that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." The Court did not simply rely on the use of the term "shall," but considered the specific context in which it appeared and concluded that the imposition of a jurisdictional requirement would be inconsistent with the legislative history and the remedial purposes of Title VII.

The *Zipes* decision aptly illustrates that no universal legislative lexicon has yet been developed and that the

courts, therefore, must consider each provision against the background of its enactment. *Cf. Wirtz v. Local 153, Glass Bottle Blowers Ass'n,* 389 U.S. 463, 468, 88 S. Ct. 643, 646 (1968). The legislature's use of terms such as "shall" and "must," rather than "may," does not automatically require that the provision be construed as mandatory, much less jurisdictional. A variety of factors must be considered, including whether such a construction would produce an absurd or unnecessarily harsh result. *See Bartholomew v. United States,* 740 F.2d 526, (7th Cir. 1984); *Ralpho v. Bell,* 569 F.2d 607, 626-28 (D.C. Cir. 1977); *see also Walsh v. United States,* 723 F.2d 570, 573-74 (7th Cir. 1983) ("may" construed as mandatory); *Thompson v. Clifford,* 408 F.2d 154, 158-60 (D.C. Cir. 1968) (same). In the context of § 106(b), such an interpretation would lead to "absurd" and "harsh" results, in the sense that it would undermine the general purposes of the 1978 CETA amendments described above and the evident purpose of the 120-day limit itself.

In conclusion, the Grant Officer's failure to comply with the 120-day deadline of § 106(b) did not divest the DOL of jurisdiction over this dispute. We will now consider the merits of the Secretary's decision.

III. "Maintenance of Effort" Violations[6]

As authorized by state law, the County has, since the 1930's, maintained some form of work relief for general-

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[6] Pursuant to Fed. R. App. P. 17(b), the DOL filed a certified list with this court in lieu of the administrative record. Although the party seeking review is ordinarily responsible for assembling the record, *Trotter v. Klincar,* 748 F.2d 1177, 1184 n.8 (7th Cir. 1984), Rule 17(b) represents a departure from this allocation of responsibility, *see* J. Moore, B. Ward & J. Lucas, 9 Moore's Federal Practice ¶¶ 217.02[1], [3] (2d ed. 1982).

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assistance recipients. *See* Wis. Stat. § 49.002. During the 1970's, this program was known as the Pay for Work Program ("PFWP") and, prior to 1977, it provided 550 to 750 minimum-wage positions, primarily within the county government, for individuals who would otherwise be receiving cash welfare grants. Both the general-assistance program and the PFWP programs were funded by County revenues.

During the period under consideration, Petitioner made the following expenditures for PFWP:

YEAR	EXPENDITURE
1975	$2,335,996
1976	$3,014,580
1977	$2,097,428
1978	$ 333,277

(Continued on following page)

We acknowledge the value of Rule 17(b) in that it allows parties seeking review of agency action to forego the expense associated with filing and transcribing the complete administrative record when an examination of the entire record may not be necessary. Nonetheless, although technically permissible, the filing of a certified list may be inappropriate, especially if the Petitioner challenges the evidentiary basis of the agency's rulings. If the Petitioner is relying on some portion of the record, it should at least provide it in an appendix to the court.

In any event, the County does not, for the most part, dispute the Secretary's findings of fact, but rather the application of the relevant legal rules to those facts. To the extent that the County disagrees with the Secretary's findings, we have determined that these facts are not material to the resolution of this dispute. Thus, we have proceeded to consider the Secretary's order on the basis of the briefs and appendices filed with this court.

Petitioner also made the following expenditures on general-assistance grants:

YEAR	EXPENDITURE
1976	$8,705,256
1977	$8,818,328

Petitioner had originally budgeted for 1977 over $4.2 million for PFWP in order to expand the program to 1200 positions. This goal, however, was never achieved. The initial budget for general assistance for the same year of $3.1 million was substantially less than the amount actually spent in 1976. The ALJ in fact found that the 1977 budget had been set at an "unrealistically low" level. In early 1977, it became apparent that the original budget for the general-assistance program was inadequate. The County transferred during the latter half of 1977 $2.2 million from PFWP and $1.25 million from the County contingency fund to general assistance and ultimately spent $8.8 million for general assistance. By the middle of 1977, however, PFWP had approximately 682 participants and a "backlog" of 2,000 individuals who were eligible for the program, but for whom positions were not available.

During the first half of 1977, the County began planning for a new CETA program that would provide training and work experience to individuals eligible for general assistance, *i.e.*, the same class of individuals served by PFWP. The result was the creation of two new CETA programs. The first, Learn-to-Earn ("LTE"), which began in June 1977, was a training program in job-search skills and was funded under Title I of the Act. The original budget for LTE was $1,022,311 for the period from June 7, 1977, to December 31, 1977. The second,

Handicapped Serving the Handicapped ("HSH"), provided work-experience and public-service employment positions in sheltered workshops and was funded under Title VI of the Act. The original budget for HSH was $2,409,624 for the period from July 1, 1977, to June 30, 1978. By the end of 1977, 571 general-assistance eligibles were enrolled in the work-experience segment of HSH.

In early 1978, LTE and HSH were combined and renamed the Work Assistance Program ("WAP"). Additional funding was obtained under Titles II (public service employment) and III (youth employment) of the Act, and from the County. WAP, like its predecessors LTE and HSH, was to benefit the general-assistance population.

Although it is not essential to the resolution of this dispute, there are indications that, during the second half of 1977, participation in PFWP began to decline and that the County apparently reduced its referrals to PFWP and began to refer eligible general-assistance applicants to the CETA programs. Thus, it would appear that, in January 1978, when the County transferred PFWP to the CETA Work Assistance Program, the number of participants in the County-funded program was below 682.

The Grant Officer found that, because PFWP was discontinued in January of 1978, the County's expenditures in 1977 should be used as the benchmark in determining whether a violation of the CETA maintenance-of-effort provisions had occurred. Thus, since the total amount of non-federal funds expended for work-experience positions for general-assistance eligibles in 1978 was greater than the corresponding amounts for 1977, the Grant Officer found no violation.

The Secretary reversed this portion of the Final Determination. He first rejected the Grant Officer's reasoning as too superficial, because it did not account for the fact that CETA funds were initially expended in 1977. After finding that WAP was the functional replacement for PFWP, in that both programs provided work-experience positions for the general-assistance population in lieu of cash grants, the Secretary concluded that this replacement began in 1977, when CETA funds were first used for the LTE and HSH programs. He also found that:

> The record leaves absolutely no doubt that the major purpose of the WAP was to save County tax levy dollars previously spent on both General Assistance and the PFWP by creating a new employment and training program for General Assistance eligibles to be supported by Federal CETA dollars.

The Secretary concluded that Petitioner had violated the maintenance of effort provisions in that it failed to maintain its funding in 1977 and 1978 (when these CETA programs were first implemented) at the 1976 level and that the substitution of CETA funds resulted in the substitution of federal for non-federal funds "in connection with work that would otherwise be performed." The year 1976 was chosen as the base year for comparison, because this was the most recent year during which no CETA money was expended for work-experience positions for the general-assistance population. Thus, the extent of the substitution was determined in the following manner:

YEAR	NON-FEDERAL EXPENDITURES	"SHORTFALL"
1976	$3,014,580	N/A
1977	$2,097,428	$ 917,152
1978	$2,732,487	$ 282,093
		TOTAL: $1,199,245

The County was, therefore, ordered to pay $1,199,245 in disallowed costs to the DOL.

CETA contains a number of "maintenance of effort" provisions designed, in general, to require CETA grantees to use CETA funds to create *new* employment and training opportunities, to guard against the displacement of current civil-service employees, and to ensure that federal grants are not substituted for local funding of the same jobs or public services.[7] Certain provisions prohibit "the substitution of Federal for other funds in connection with work that would otherwise be performed."[8] Section 605(b) of the Act[9] states that "[n]o funds for public service employment programs under this chapter may be used to provide public services, through a private or nonprofit organization or institution, which are customarily provided by a State, a political subdivision, or a local educational agency in the area served by the project." Other provisions prohibit the substitution of federal for nonfederal funds.[10]

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[7] *See generally* CETA § 205(c)(8), (25), 29 U.S.C. § 845(c)(8), (25) (1976); CETA § 208(a)(1), 29 U.S.C. § 848(a)(1) (1976); CETA § 353(a), (b)(1)-(6), 29 U.S.C. § 895b(a), (b)(1)-(6) (Supp. I 1977); CETA § 602(c), 29 U.S.C. § 962(c) (1976); CETA § 605(b), 29 U.S.C. § 965(b) (1976); CETA § 703(7), (11), 29 U.S.C. § 983(7), (11) (1976); *see also* 29 C.F.R. §§ 96.24, 97.334, 97.719, 99.34 (1978).

[8] *See, e.g.*, CETA § 208(a)(1)(C), 29 U.S.C. § 848(a)(1)(C) (1976); CETA § 353(b)(3), 29 U.S.C. § 895b(b)(3) (Supp. I 1977); CETA § 602(c), 29 U.S.C. § 962(c) (1976); CETA § 703(7), 29 U.S.C. § 983(7) (1976); *see also* 29 C.F.R. § 99.34(b)(3) (1978); *cf.* CETA § 205(c)(25), 29 U.S.C. § 845(c)(25) (1976).

[9] 29 U.S.C. § 965(b) (1976).

[10] *See, e.g.*, CETA § 205(c)(25), 29 U.S.C. § 845(c)(25) (1976); CETA § 703(11), 29 U.S.C. § 983(11) (1976).

The County does not dispute the factual findings of the Secretary, and its attack is a narrow one that is limited to the finding that the use of CETA funds resulted in the substitution of federal for non-federal funds "in connection with work that would otherwise be performed." Petitioner argues that the Secretary misconstrued the maintenance-of-effort provisions. The County's position is, in essence, that there was no "work that would otherwise be performed" that was affected by Petitioner's expenditure of CETA funds in 1977. Petitioner claims that no PFWP participant was transferred out of that program in 1977; it does concede, however, that "certain CETA-eligible welfare recipients on the '[PFWP] backlog' were enrolled in the CETA-funded [LTE] and [HSH] programs." Petitioner maintains, however, that, since these 1977 participants had not previously been working in a County-funded program, their enrollment in the CETA programs "cannot be viewed as substituting federal for other monies in connection with work that would otherwise be performed."

Petitioner's position represents a misreading of the maintenance-of-effort provisions and their implementing regulations, as well as a misunderstanding of their purpose. These statutes are phrased in the conditional, yet Petitioner would have them reach only work that "was being performed," not work that "would otherwise be performed." Congress intended that CETA funds supplement, not replace, non-federal funding. *See Maine v. United States Department of Labor*, 669 F.2d 827 (1st Cir. 1982). A requirement of a "maintenance" of effort is meaningless unless a benchmark is available to determine the appropriate level of the "effort." In addition, even

Petitioner's own argument is an acknowledgment that the inquiry must focus, not on the number of individuals in a given program, but on the level of funding and that a "benchmark" must be initially established. The crucial issue, then, is whether 1976 or 1977 is the appropriate year for determining the level of the County's "effort." Thus, the question of whether there was participant "attrition" in PFWP during 1977 is, under these facts, of little moment, as it is the level of funding, not the number of participants, that is dispositive.

We agree with the Secretary's conclusion that, although Petitioner was entitled to use CETA funds to provide training and work experience for the general-assistance population, it was at the same time required to maintain its local funding for substantially equivalent County programs at the level of the most recent year in which no CETA money was expended for these purposes. Thus, 1976 provides the proper reference point. Had the County maintained its funding at the 1976 level, some portion of the work-experience positions and public services provided by LTE, HSH, and WAP would otherwise have been funded by non-federal money. Because the County did not, work and services were performed as a result of the substitution of federal funds for non-federal funds.

In its reply brief, Petitioner counters with the argument that its reduction of the 1977 PFWP budget was not due to the decrease in the number of participants or substitution of federal for non-federal funds, but to the fact that, after the Supreme Court's decision in *National League of Cities v. Usery*, 426 U.S. 833, 96 S. Ct. 2465

(1976), *overruled, Garcia v. San Antonio Metropolitan Transit Authority*, — U.S. —, 105 S. Ct. 1005, 1021 (1985), the County decided to reduce the PFWP employees' wages and hours below the minimum federal requirements. In 1976, the County paid $2.20 an hour for a 40-hour work week; in 1977, the County paid $2.00 an hour for a 32-hour work week. Thus, assuming that the same number of employees, *i.e.*, 682, was participating in PFWP in 1976 and 1977 and that those employees worked 52 weeks a year, the County was able to "save" $851,136 in 1977.[11]

We initially note that this figure represents only 93% of the "shortfall" found by the ALJ for 1977 and only 71% of the total deficiency for 1977 and 1978. Moreover, this second argument suffers from the same fundamental deficiency as the first, for the relevant question under the maintenance-of-effort provisions is not the number of positions, but the level of non-federal funding before and after the use of CETA funds. It is clear from the wording of these statutes that Petitioner cannot discharge its obligations under CETA by simply retaining the same number of employees at a reduced annual salary while using CETA funds to provide employment for similarly situated individuals. Following Petitioner's argument to its logical extension would mean that, if the *National League of Cities* decision had allowed the County to pay $1

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[11] As noted above, the record does not necessarily support the conclusion that 682 participants remained in the PFWP throughout 1977. We will assume for the sake of argument that this level was maintained.

We also note that the County, presumably because of an inadvertent mathematical error, overstated in its reply brief the amount of this "savings" by 80% (i.e., $682,000).

a year to each PFWP participant, then the County would have discharged its obligations under CETA had it allocated only $682 of County funds to PFWP in 1977.

Quite to the contrary, we find that the *National League of Cities* argument further undercuts Petitioner's position: in view of the availability of CETA funds, the proper response to the wage-and-hour reduction after *National League of Cities* would have been the creation of more PFWP positions, especially in view of the backlog of eligible applicants in 1977. The County did in fact originally intend to expand PFWP in 1977 with a considerably larger budget, but subsequently reduced the program with substantial transfers from PFWP to the general-assistance program after it was known that CETA funds were available. The *National League of Cities* decision may justify the wages and hours of PFWP participants in 1977, but it does not explain why the original 1977 PFWP budget of $4.2 million was ultimately reduced to $2 million when approximately $2 million were spent in the CETA programs in 1977.

We have considered all of the remaining arguments raised by Petitioner in its challenge to the Secretary's finding of a violation of the maintenance-of-effort provisions and have found them to be without merit. In conclusion, we agree with the Secretary's finding that Petitioner did not meet its obligation under the maintenance-of-effort provisions of the Act and that the "shortfall" for 1977 and 1978 should be disallowed.

IV. Wage and Benefit Review

Regulations for CETA Titles I and VI that were in effect from the inception of the County's CETA programs

in mid-1977 to April 1, 1979, provided that wages and benefits for work-experience participants were to be commensurate with such factors as the type of work performed, the skill proficiency of the participant, the geographic region of the program, and the prevailing wages and benefits for similarly employed employees. *See* 29 C.F.R. §§ 95.33(d)(4)(viii), 96.34, 98.24(b), 99.37(e) (1978).[12] However, the base wage provided by the County for work-experience participants in WAP was set at the federal minimum wage.

In his Initial and Final Determinations, the Grant Officer concluded that Petitioner had violated CETA regulations by paying only minimum wage and by not providing the proper benefits. The initial corrective action proposed was an order to the County to classify all work-experience positions in WAP by the factors enumerated in the applicable regulations, to determine the proper wages and benefits under the regulations, and to submit the results to the DOL's regional office for review. The Final Determination modified this remedy to require that the County first notify all former CETA participants, by newspaper notices and mailings, to submit claims if they believed they were underpaid. A representative of the employees could also submit specific documentation on individual participants. The claims would next be reviewed by an outside agency, which would then notify each participant of the results of the review and of the right to appeal to the Office of Administrative Law Judges. Costs for the record review, back wages, and benefits could be paid from CETA funds.

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[12] 20 C.F.R. § 676.26-1(b) (1984), which became effective on April 1, 1979, see 44 Fed. Reg. 19,990, 20,014 (1979), allowed the payment of the minimum wage to almost all work-experience participants.

The County did not appeal this portion of the Final Determination and has thereby conceded liability; the complainants, however, in the proceedings before the ALJ, did contest the corrective action ordered by the Grant Officer on the ground that the burden of determining the proper wages and benefits should be borne by the County, not by the individual CETA participants.

The ALJ found that the record lacked the type of detailed information needed to allow him to establish the proper wages and benefits for each of the approximately 5,400 individuals enrolled in the County's CETA programs between July 1, 1977, and April 1, 1979. He also concluded that the corrective action ordered in the Grant Officer's Initial Determination was more appropriate than that of the Final Determination. He found that a requirement of computation of the appropriate earnings prior to notification to former employees was necessary because this placed "the burden of evaluating jobs and calculating wages on the prime sponsor, which could have avoided the problem by following the regulations in the first place, and which has better access to the necessary information than former participants." Thus, the ALJ ordered that the County classify all CETA work-experience positions according to the factors enumerated in the regulations, determine the proper wages and benefits, and submit the results to the regional DOL office for review within 60 days of the date of his decision. The DOL office would then have 30 days to review these submissions and the County would have 30 days thereafter to compensate all underpaid former CETA participants that could be located. If, due to changed circumstances, federal funds were not available for the back wages, the benefits, and the expenses associated with the record review, the County was required

to defray these costs from its own funds. The Final Determination was affirmed in all other respects.

In its petition for review, the County contests the corrective action ordered and argues that the Secretary's requirement of a comprehensive wage review was an abuse of discretion and not in accordance with the applicable law. We concur in the Secretary's observation that the County, with superior access to the records and as the party at fault, should bear the costs of the record review. Furthermore, we recognize that, given the characteristics of the class of former CETA employees, it is unreasonable to assume that they will be able to recognize independently whether they are entitled to additional compensation.

Nonetheless, it is not obvious that the appropriate solution is to require Petitioner to complete the record review for *all* former participants when a substantial number of them will never be located. The former employees bear the burden of coming forward after they have received notice whether the record review is performed before or after the notification. However, undertaking the review before notification would require Petitioner to perform many costly calculations that will never be used, when the goal of the record review is to provide the proper compensation to the former CETA participants at a reasonable cost to all parties involved. Thus, to the extent that the Secretary's order requires Petitioner to incur substantial expense in undertaking the wage review[13] prior to

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[13] At oral argument, the County represented to this court that the wage review cannot be accomplished solely by computer analysis *en masse* of the information the County now has at its disposal and that the determination requires an examination of the individual records for each former participant. We do not understand the Secretary to argue to the contrary. In fact, at oral argument, counsel for the DOL stated that the Secretary would not object if notice were provided prior to the record review.

notification when it is almost certain that, despite reasonable efforts at notification, a considerable number of former CETA participants will never be located, we agree that the remedy constitutes an abuse of discretion. We conclude that notice should first be sent to the participants and that the record review should then be performed for those individuals who come forward. To that extent, we reinstate the corrective action set forth in the Grant Officer's Final Determination.

We note, however, that the Final Determination required that the County notify all CETA participants to submit claims *if they believed they were underpaid.* This places an inappropriate burden on the participants, as it calls for a threshold determination on their part that they are in fact entitled to additional compensation. Thus, the initial notice must simply instruct those individuals who participated in CETA programs during the relevant period to come forward; the records of the individuals who are located will then be analyzed by Petitioner. The Secretary should determine the proper form of notice to be sent to the former CETA employees and set the appropriate procedure and schedules for the subsequent record review and reimbursement.

We have considered all of the remaining arguments raised by Petitioner in its challenge to the record review and have found them to be without merit. In conclusion, this portion of the Secretary's order is remanded for action consistent with this opinion.

V. Disallowed Costs under CETA Title VI

The Secretary found, and Petitioner does not dispute, that 17 WAP participants were originally enrolled under

CETA Title VI following their transfer from PFWP in 1978 when they were in fact ineligible under that Title. The County, however, claimed that any initial misallocation was "cured" when the costs associated with these participants were subsequently "backed out" of Title VI and applied to Title I, under which the participants were eligible. The Secretary rejected this argument:

> [E]ligibility determinations should be made *before* a participant is enrolled in CETA and the key eligibility question is whether, at the time of application, a participant is eligible for the title in which he or she is then enrolled. See 29 CFR 99.42(a)(1). Adjustments of the type made here by the prime sponsor cannot retroactively create eligibility. Moreover, any attempt to do so would be contrary to the cost principles of Federal Management Circular 74-4 . . . , codified at 41 CFR Subpart 1-15.7, incorporated by reference in the CETA regulations at 29 CFR 98.12(a). According to 41 CFR 1-15.703-2(b):
>
> > "Any cost allocable to a particular grant or cost objective under the principles provided for in this subpart may not be shifted to other Federal grant programs to overcome fund deficiencies, avoid restrictions imposed by law or grant agreements, or for other reasons."
>
> (emphasis in original)

Thus, Petitioner was ordered to pay the DOL the amount of the disallowed costs for these 17 participants.

The County's argument is unpersuasive, and its cursory description of the proceedings below has not aided our review. In addition, there are no citations to the record on the issue of cost allocation. We, therefore, have no information regarding the cryptic allusions to the subsequent "backing out" of the costs associated with these 17 individuals.

In any event, as we understand its contentions, the County, with no citation to authority, maintains that, although these individuals were initially improperly enrolled under Title VI when they were eligible under Title I, the "backout" of costs was "a bookkeeping or accounting practice used to cure a bona fide human error in participant enrollment, and not an evasive act designed 'to avoid restrictions imposed by law.'" so that the costs should not be disallowed. We disagree.

CETA Titles I and VI had different eligibility criteria. *Compare* 29 C.F.R. § 95.32 (1978) (Title I) *with id.* § 99.42 (1978) (Title VI). The requirements of Title VI were more stringent. For example, under 29 C.F.R. § 99.42(a)(1)(ii), the participant (1) must have been unemployed or receiving unemployment compensation for 15 out of the 20 weeks preceding his application and (2) must not have obtained permanent, unsubsidized, full-time employment during that 20-week period. We gather from the ALJ's decision that he relied on the employee-record evaluation described in the affidavit of Helen Humphrey, a "Manpower Development Specialist" for the DOL. With reference to the 17 individuals under consideration, Ms. Humphrey, because of the County's inadequate documentation, found that none of these participants met the requirement of 29 C.F.R. § 99.42(a)(1)(ii).

29 C.F.R. § 99.43(a) (1978) provides that "[p]rime sponsors shall be liable for any payments made to participants determined ineligible during program audits or reviews or otherwise." *See also* 29 C.F.R. §§ 96.25, 99.42(c)(1) (1978). 29 C.F.R. § 99.43(b) and (c) set out procedures that would allow prime sponsors to "protect their liability [sic]." *See also* 20 C.F.R. § 676.88(c) (1983).

Petitioner has in no way indicated that it followed those procedures with reference to these 17 participants. Although disallowance of the costs may appear inflexible, the regulations discussed above set out the limited circumstances under which the County may escape liability. Otherwise, it bears the risk that the associated costs will be disallowed. The County is essentially arguing that it is "unfair" to impose this sanction. Although the regulations do not suggest that equitable exceptions are available, we need not decide this question, as the equities clearly do not weigh in the County's favor. We, therefore, affirm the ALJ's decision that the costs associated with these 17 individuals be disallowed.

VI. Backpay Award to Cheryl Tucker

Ms. Tucker, a former PFWP staff mamber, was laid off on May 8, 1978, due to the termination of that program, and maintained no further communications with Petitioner. The Secretary noted that it was undisputed that Ms. Tucker was laid off due to the dissolution of the County-funded PFWP, which was replaced by the CETA-funded WAP, and thus concluded that the layoff was a displacement of a currently employed worker in violation of the maintenance-of-effort and anti-displacement provisions of the Act.[14] The County was ordered to take affirmative steps to locate Ms. Tucker, to offer her reinstatement to a comparable position, and to award her backpay plus interest from non-CETA funds; however, the County could offset against this award, upon proof sub-

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[14] *See, e.g.*, CETA § 208(a)(1)(B), 29 U.S.C. § 848(a)(1)(B) (1976); § 353(b)(2), 29 U.S.C. § 895(b)(2) (Supp. I 1977); § 602(c), 29 U.S.C. § 962(c) (1976); § 703(7), 29 U.S.C. § 983(7) (1976); *see also* 29 C.F.R. § 99.34(b)(2) (1978).

mitted to the Grant Officer, any amounts of wages earned by Ms. Tucker or of general assistance paid to her by the County after her layoff.[15]

The County does not contest the finding of liability and apparently does not challenge the reinstatement order. It does maintain, however, that (1) the award of backpay should be remanded to the DOL due to the absence of findings on the extent of Ms. Tucker's injury and on her efforts to mitigate those damages and (2) the Secretary improperly limited the scope of offsetting payments for the backpay award. Once again, there is little reliance on relevant legal authority and *no* citation to the record in the County's brief.

Because Ms. Tucker was terminated without cause in violation of the maintenance-of-effort and anti-displacement provisions of the Act, there is no serious question that backpay was an appropriate remedy. *See City of Chicago v. United States Department of Labor*, 753 F.2d 606, 607-08 (7th Cir. 1985). It is, of course, unreasonable under these circumstances to require that the Secretary set an exact amount on the backpay award, as this liability continues to accrue until reinstatement. In any event, the Secretary intended that a calculation of the precise amounts be made by the parties, with the aid of the Grant Officer, if necessary.

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[15] The Secretary represented to this court at oral argument that Ms. Tucker has recently been in communication with the County, that she has been reinstated with the County, and that she is in the process of transmitting information to the County with regard to the income she had earned since her layoff. The Secretary has also suggested that Ms. Tucker has not been reinstated at the appropriate level; that question is not, however, before us. Similarly, the issues raised in the amicus brief filed by the Worker Rights Institute and John Kropp are not properly before us.

The County had the burden of proving that Ms. Tucker failed to make reasonable efforts to mitigate her damages. *Cf. Hanna v. American Motors Corp.*, 724 F.2d 1300, 1306-07 (7th Cir.), *cert. denied*, 104 S. Ct. 3512 (1984); *Syvock v. Milwaukee Boiler Manufacturing Co., Inc.*, 665 F.2d 149, 159 (7th Cir. 1981); *NLRB v. Nickey Chevrolet Sales, Inc.*, 493 F.2d 103, 107-08 (7th Cir.), *cert. denied*, 419 U.S. 834 (1974). Petitioner, however, has in no way indicated that it attempted to locate Ms. Tucker in order to determine the extent of her damages or her efforts at mitigation. In view of the County's concession of liability and its failure of proof, a remand on the issue of mitigation is inappropriate in this protracted dispute.

Finally, we perceive no deficiency in the scope of the payments that may be offset against the backpay award. Petitioner has cited no authority in support of its position and we find that the Secretary's order was reasonable. As the County is at fault, it would be inappropriate to allow it to offset funds paid to Ms. Tucker by other governmental entities, as these payments would constitute benefits from a collateral source and deducting them would in effect relieve the County of its obligation to make the former employee whole. The responsibility, if any, for repayment to other governmental entities lies with Ms. Tucker. The Secretary was simply permitting the County to offset payments that it may have already made to Ms. Tucker from other sources after the layoff.

The ALJ's order concerning Ms. Tucker will be affirmed.

VII.

In conclusion, the petition for review is denied with reference to the issues regarding (1) the Secretary's juris-

diction, (2) the maintenance-of-effort violations, (3) the disallowed costs under CETA Title VI for the 17 ineligible participants, and (4) the backpay award for Ms. Tucker. With regard to the record review, the petition for review is granted in part and the case is remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

COFFEY, *Circuit Judge*, concurring in part and dissenting in part.

I concur in the majority's well-reasoned analysis that the 120-day time limit set forth in 29 U.S.C. §816(b) is not a jurisdictional bar to actions taken by the Secretary of Labor after expiration of the 120-day time limit. I further concur in Sections IV, V, and VI of the opinion. However, I am unable to agree with the majority's resolution of the alleged "Maintenance of Efforts" violations discussed in Section III of the opinion. Although I agree that the majority is correct in using 1976 as the "benchmark" for purposes of analyzing whether or not there has been a "Maintenance of Efforts" by county officials in funding the local job training programs, I cannot agree that the County should be liable for the entire amount of the "shortfall" in funding since the County enacted cost-saving measures in 1977 that explains, in part, why their funding in 1977 did not match their spending efforts in 1976. Thus, I would remand this case to the administrative law judge for an accurate determination of the "shortfall" in local funding.

As set forth in the majority opinion, the non-federal funding of the local job training program for the general welfare recipients from 1976 through 1978, (the years in

question) was $3,014,580 in 1976, $2,097,428 in 1977, and $2,732,487 in 1978.[1] In 1977, CETA began to fund various job training programs for general welfare recipients in Milwaukee County, budgeting approximately $1 million in 1977 for the LTE program and approximately $2.4 million for the HSH program from July 1, 1977 to June 30, 1978. These programs, local and CETA, were geared toward training general assistance welfare recipients for future employment in the private sector.

Congress in enacting the CETA program sought to create *new* employment and training opportunities for welfare recipients. *See* 20 C.F.R. §675.1(a) (1979). In order to ensure that CETA funds were not used to replace local funding, Congress promulgated rules prohibiting "the substitution of Federal funds for other funds in connection with work that would otherwise be performed" by local government entities and providing for annual audits conducted by the Secretary of Labor. *See, e.g.*, 29 U.S.C. §845(c)(a) (25) (1976); 29 U.S.C. §848(a)(1) (1976); 29 C.F.R. §99.34(b)(3). In this manner, Congress sought to ensure that local communities maintain their effort in providing job training programs when the CETA funding became available. The majority chooses the funding level provided in 1976 as the "benchmark" or focal point to determine if Milwaukee County maintained their funding of local job training programs once CETA funds became available. It is proper to use 1976 as the focal point for

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[1] In 1978, the County's job training program, PWFP, was eliminated; the County established a job-training program entitled the Work Assistance Program ("WAP"), that was funded by the County and the State in the amount of $2,732,487. CETA's contribution to the WAP program was approximately $200,000.

purposes of comparison since 1976 is the year prior to CETA funds becoming available for job training programs for the general welfare assistance population in Milwaukee County. In 1976, the level of non-federal spending was $3,014,580, while in 1977, the year CETA funds became available, the non-federal funding dropped to $2,097,428, and rose slightly in 1978 to $2,732,487. However, based upon these figures alone, the majority concludes that there was a "shortfall" in the effort by the County to train workers under its programs. The majority agrees with the ALJ's finding that the County is responsible for the entire difference in funding, totaling $1,199,245; but the majority fails to consider much less weigh any information as to how and why these figures necessarily differ.

At least as a starting point for the purpose of analysis in establishing whether or not the County had maintained its efforts in the local job-training programs, it is proper to compare the level of spending between the years 1976, 1977 and 1978, and assessing the County $1,199,245 for the alleged CETA violation would be appropriate if the County was in fact unable to explain the reduced funding in its local program. However, for some unknown reason, the ALJ and now the majority fail to consider that the County, beginning in late 1976 and through 1977, instituted cost-saving measures in its local job-training program when it reduced the workers' wages and hours, and thus the majority and the ALJ disregard the County's sincere efforts to operate the most cost-efficient program possible. Specifically, relying on *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled Garcia v. San Antonio Metropolitan Transit Authority*, —— U.S. ——, 105 S.Ct. 1005 (1985), the County reduced the wages and cut the hours of

participants in its job training programs in an honest attempt to save taxpayers some expense in providing these programs. As the majority notes, these cost-saving measures saved the County approximately $850,000 in 1977 and as the majority admits, this figure represents 93 percent of the shortfall in funding during 1977. However, the majority refuses to take this into account in computing the potential liability of the County, and instead applies a simplistic analysis using only the gross funding figures without any inquiry whatsoever into the number of workers employed in the locally funded programs during the years in controversy, 1976 through 1978. This analysis penalizes the County for instituting cost-saving measures to save taxpayer's hard-earned dollars. The majority boldly asserts that "the proper response to the wage and hour reduction after *National League of Cities* would have been the creation of more PFWP positions . . . ." Thus, the majority's position is that the only way the County could avoid liability was to have increased its efforts in training more general assistance welfare recipients than it was training in the previous year. But this position does not espouse a maintenance of effort, consistent with the requirement that federal funds not be substituted for work that "would otherwise be performed" by the County, rather it requires the County to have increased its job training efforts with the employment of more workers and to have spent funds at previous year's levels regardless of whether or not it was the most cost-efficient use of taxpayer dollars. The County, on the other hand, logically argues that it maintained its efforts in training general welfare recipients in not transferring any workers employed in the PWFP program to the CETA funded programs and in replacing those workers who left the local

program, after their training was completed, with persons on the waiting list. Because the ALJ failed to make specific findings as to the number of welfare recipients employed in the program at any given time this case must in all fairness be remanded to the trier of fact to complete the record for proper review. Nevertheless, the majority penalizes the County for enacting cost-saving measures when it adopts the position that the County, with the savings accumulated through pay-cuts, was required to use the savings to employ more general assistance welfare recipients in its own program. The majority fails to cite, nor could I discover, any case law to support this gratuitous theory of federal meddling in a local budgetary decision.

Because the record before us is sparse and unclear as to the number of workers actually employed in the County job-training programs for the years in question, *see* majority n.11,[2] this case should be returned to the ALJ to determine what portion of the County's "shortfall" in funding is explained by the County's legitimate cost-saving measures. Further, the ALJ should determine whether the County, in instituting the reduced wages and shorter hours, was able to employ more trainees or employ persons in the program for a longer period of time; thus, enabling these persons to gain more experience and remain off the assistance roles. I am convinced that in fairness to the community which implemented cost-saving measures to benefit its taxpayers, that the community should not be responsible for reimbursing the federal government for any amount of money resulting from these

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[2] The record contains evidence that the number of workers employed in PWFP ranged anywhere from 250 to 682 toward the end of 1977.

cost-saving efforts. In this era of reductions in government deficit spending and increased government economy caused by bureaucratic mismanagement of the past, the majority decision penalizes a community that effectuated cost-saving and cost-efficient programs for the benefit of the welfare recipients and the taxpayers as well.

Thus, I respectfully dissent from Section III of the opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 26, 1985.

Before

Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. ROBERT A. GRANT, Senior District Judge*

MILWAUKEE COUNTY, WISCONSIN,

Petitioner,

No. 84-1067 VS.

WILLIAM E. BROCK, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR,

Respondent.

Petition for Review
of an Order of the
United States
Department of Labor

ORDER

On consideration of the "MOTION FOR ORDER AMENDING PANEL OPINION" filed herein on August 16, 1985, by counsel for petitioner,

IT IS ORDERED that said motion is GRANTED. The following sentence, which appears on page 21 in the

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* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, sitting by designation.

second paragraph of footnote 11 of the opinion issued August 6, 1985, in the above-captioned case is deleted:

> "We also note that the County, presumably because of an inadvertent mathematical error, overstated in its reply brief the amount of this 'savings' by 80% (i.e., $682,000)."

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 6, 1985

Before

Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. ROBERT A. GRANT, Senior District Judge*

MILWAUKEE COUNTY, WISCONSIN,

Petitioner,

No. 84-1067 vs.

RAYMOND J. DONOVAN, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR,

Respondent.

Petition for Review of an
Order of the United States
Department of Labor

This cause was heard on the record from the United States Department of Labor, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the petition for review of an order of the Department of Labor is DENIED IN PART, GRANTED IN PART, and the case is REMANDED, in accordance with the opinion of this Court filed this date. No costs are awarded in this Court.

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* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, sitting by designation.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

September 9, 1985.

Before

Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. ROBERT A. GRANT, Senior District Judge*

MILWAUKEE COUNTY, WISCONSIN,

Petitioner,

No. 84-1067 VS.

WILLIAM E. BROCK, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR,

Respondent.

Petition for Review
of an Order of the
United States
Department of Labor

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by petitioner, no judge in active service has requested a vote thereon, and all of the judges on the

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* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, sitting by designation.

original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

Case No. 80-CETA-146

In the Matter of
THE WORKFARE COALITION *et al*[1]

and

JOHN H. KROPP

Complainants

v.

MILWAUKEE COUNTY (CETA prime sponsor)

and

REGION V, U.S. DEPARTMENT OF LABOR

Respondents

Mary B. Griswold, Executive Director and
John A. Plano, Associate Director
Worker Rights Institute
818 East Juneau Avenue
Milwaukee, Wisconsin 53202
For the Complainant Workfare Coalition

John H. Kropp
2189 West Maine Ave.
Milwaukee, Wisconsin 53209
Pro Se

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[1]On September 1, 1977 the Workfare Coalition was incorporated and changed its name to the Worker Rights Institute. Prior to that time the coalition was composed of several member agencies and individuals directed by a governing committee that constituted itself as the board of directors when the corporation, a non profit organization to provide information, legal help, and organizing support to workers in welfare related work programs, was formed.

Charles D. Clausen, Esq.
David P. Lowe, Esq.
Mary J. Mountin, Esq. and
William S. Roush, Jr., Esq.
Friebert & Finerty
710 North Plankinton Ave.
Milwaukee, Wisconsin 53203
and

James T. McClutchy, Esq.
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Milwaukee County,
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Milwaukee, Wisconsin 53233

For the Respondent Milwaukee County (prime sponsor)

Ellen L. Beard, Esq. and
Jonathan H. Waxman, Esq.
Office of the Solicitor
U.S. Department of Labor
Room N-2101
200 Constitution Avenue, N.W.
Washington, D.C. 20210

For the Respondent Region V and the Grant Officer

Before: ROBERT S. AMERY
Administrative Law Judge

DECISION AND ORDER

This proceeding arose under the Comprehensive Employment and Training Act of 1973, as amended, 29 USC 801 et seq., hereinafter referred to as the Act or CETA, and the regulations issued thereunder in 29 and 20 CFR. The first written complaint to the Department of Labor (DOL) Regional Administrator dated February 20, 1978

was signed by Mary B. Griswold for the Complainant Workfare Coalition. A second letter of complaint containing 57 numbered points or issues addressed to Assistant Secretary of Labor Ernest Green dated May 25, 1978 was signed by about 22 persons.[2] Most of the matters raised in the February 20, 1978 complaint were also alleged in the May 25, 1978 complaint in more detail. A third letter of complaint dated December 11, 1979 signed by Ms. Griswold added about 16 further allegations against the prime sponsor and Region V DOL. On May 4, 1978 Milwaukee District Council 48 of AFSCME filed a complaint signed by Executive Director Joe Robison alleging violations of CETA's maintenance of effort requirements, however this complaint was not appealed at this level by the District Council, but by John H. Kropp, a union member. Mr. Kropp filed his separate complaint dated January 16, 1980 primarily pertaining to maintenance of effort issues. These complaints were consolidated with several other individual complaints involving Lori Baker, Cherae Rose

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[2]These included Wesley L. Scott, Director of Milwaukee Urban League, John H. Kropp, member of Local 594 AFSCME, Dismas Becker, state assembly 32d district, Cherae Rose and Mildred Gillum, Work Assistance Program (WAP) participants, Sarah Carr, President of Worker Rights Institute and WAP participant, Arthur L. Waed, Milwaukee Coalition, Grace L. Mortier, former WAP participant, Rose Peters, CETA participant, Stephen R. Leopold, State Assembly 26th district, Marge Walcer, Northcott Neighborhood House, Kay Metoxen, Workfare Coalition, Jerry Thomas, WAP participant, Prentice McKinney, Branch NAACP Coordinator, Ernesto Charon, Director of Latin American Union for Civil Rights, Mark Beil, President of Local 2748 State Employees Union, Jesus Mireles, I.C.D.P. South, Lorraine B. Baker, Local 594 member, Sandra B. Sanderson, Steward of Local 594 AFSCME, Arthur H. Williams, Steward of Local 125, Marcia P. Coggs, State Assembly 18th district and Mary Griswold, Executive Director, Worker Rights Institute.

and Mildred Gillum, Sarah Carr and Jerry Thomas into one almost unmanageable conglomerate mass.[3]

In view of the vast number of issues involved in this case and their variety and complexity I find it convenient to take each issue or group of issues dealt with by the Grant Officer in his final determinations in approximately the same order he did and to designate each issue either with the paragraph number from the 57 point complaint letter of May 25, 1978 or as otherwise identified by date or origin of the complaint. Following each issue listed, the Grant Officer's holding will be stated, then my analysis and findings and ruling will be made. Some eight weeks of hearings from August 4, 1980 to March 13, 1981 were held in this case at Milwaukee, Wis., at which numerous witnesses testified and extensive other evidence was presented on the record.

May 25, 1978 Complaints on Grievances and Notification of Rights and Benefits[4]

1. The Work Assistant Program (WAP) has failed to notify participants of their rights to hearings, to grievances and to appeals to the CETA agency and to DOL.

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[3]All parties filed briefs and some filed reply briefs in this case. I am particularly indebted to Ms. Ellen L. Beard, Grant Officer's counsel, for her exceptionally fine briefs which I found to be thorough, in point and very well written with accurate citations to the record and exhibits. I have quoted extensively from Ms. Beard's briefs in this decision.

[4]There was a complaint similar to these concerning grievances in the February 20, 1978 letter. Unless otherwise specified all numbered complaints are from the May 25, 1978 letter.

9. The WAP has not informed participants of their rights and benefits since the program began in July, 1977 despite repeated requests for the establishment of due process.

10. The WAP has failed to inform participants of the identity of their employer prior to their entering the program and while they are in it.

37. Decisions reached in grievance hearings affecting an entire class of participants are not announced to other participants and those decisions do not affect them or their activities in any way.

46. The WAP has failed to establish a grievance process from June, 1977 to February 1978. The written process now promoted as a response to Federal regulations doesn't work. The grievance process as written requires more than 7 separate meetings, hearings, conferences, etc. of the participants, doesn't clearly define procedures and format, and does not have an impartial examiner.

56. The prime sponsor has refused to monitor subcontractors and subgrantees to insure that they in fact possess grievance procedures and that CETA employees in the subagencies have access to due process rights.

The Grant Officer found that Jewish Vocational Services (JVS), which was the lead agency managing the WAP, had developed a handbook entitled "Work Assistance Program Comprehensive Employment and Training Act Workers' Handbook" outlining each participant's rights, benefits and responsibilities and the employer's responsibilities. Distribution of the handbooks began about February 1978. The handbook outlined procedures for handling grievances

at the JVS level, but lacked information on appeals to the county or DOL. The Grant Officer found no specific violations of the regulations, however he directed that JVS must assure that each CETA participant receives a copy of the handbook as well as a copy of Milwaukee County's grievance procedure, that grievances be handled promptly, that participants be informed of the name of their employer, and that adequate notification of a hearing must be given to each complainant.

The Work Assistance Program was formed under the leadership of Milwaukee County Executive William O'Donnell and Michael Galazan, then Executive Director of Jewish Vocational Services, a private, non-profit rehabilitation agency, to utilize funding from CETA and Title XX of the Social Security Act to provide work experience and social services to persons eligible for the County's General Assistance (welfare) program. The first stage of what later became the WAP was a job search program called Learn to Earn, funded under Title I of CETA, which began in June, 1977. Learn to Earn was operated by JVS, the lead agency, the Opportunities Industrialization Center (OIC) and the Service and Employment Redevelopment Jobs for Progress Center (SER), providing an 8 to 10 week classroom training course at the three agencies in job search skills. The second stage of WAP came with the implementation of a program initially known as Handicapped Serving the Handicapped, funded as a project under Title VI of CETA to provide work experience positions to persons who were not placed elsewhere after their completion of Learn to Earn. Handicapped Serving the Handicapped began in July 1977 with a subgrant to the Rehabilitation Council, an "umbrella" organization of Milwaukee

area rehabilitation facilities with JVS again acting as the lead administrative agency. The positions were located at the rehabilitation agencies providing work that had been performed by handicapped clients, including simple production assembly, food service, maintenance and clerical training. In late 1977 or early 1978 the program was expanded with the addition of Title XX social services funding and it was called the Work Assistance Program. In addition to the original funding under Titles I and VI of CETA, youth money was added under Title III, and the public service employment (PSE) component was removed from the WAP and shifted to Title II. Thus, during the remainder of 1978, WAP provided work experience and classroom job search training to a population composed of General Assistance (welfare) referrals, funded from Titles I, III and VI of CETA.

The evidence at the hearing supported the Complainants' allegations that the WAP had sometimes failed to inform CETA participants of their rights and benefits and grievance procedures, at least prior to February 1978, and that this was in violation of 29 CFR 98.24(c), and 98.26(a), however the action taken by the Grant Officer on these matters seems appropriate here.

The Complainants did not appeal the Grant Officer's final determination on these complaints, but they did request a hearing on 2 new complaints contained in the December 11, 1979 complaint letter, as follows:

14. The Program Operator (JVS) deliberately dismantled the grievance procedure and has refused to hold requested hearings.

15. The Program Operator denied grieving participants representation by advocates in meetings that affected the participants' program participation.

There was evidence at the hearing to the effect that Kay Metoxen, who often assisted CETA participants in obtaining their rights, was refused permission to represent a client at a JVS grievance hearing. However, as the Grant Officer has correctly pointed out in his brief, in this case JVS was not joined as a party to this proceeding and for that reason direct action cannot be taken against JVS here. There was other evidence from Ms. Powers, the CETA director, that the prime sponsor's office endeavored to see that each subgrantee had a written grievance procedure by early 1978 and Ms. Humphrey, the DOL federal representative, testified that by the time of her 1980 assessment the prime sponsor's complaint system was in substantial compliance with 20 CFR 683. Accordingly, as to these issues, the Grant Officer's final determination pertaining to grievances and notification of participants' rights and benefits is affirmed.

Complaint on Harassment

30. Participants have been harassed when they complained about working conditions and when they have asked for information of their rights and benefits.[5]

The Grant Officer held that it was not proven that either Milwaukee County or JVS purposely harassed partici-

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[5]One of the two examples of harassment presented to the Grant Officer involved Mary Brown, whose complaint was made a separate hearing in Brown v. Milwaukee County, 80-CETA-71. There was also an allegation of harassment of participants in the February 20, 1978 letter of complaint.

pants. However, he cautioned the prime sponsor to be guided in the future by 20 CFR 676.82(b) prohibiting discrimination and harassment of participants.

At the hearing there was some evidence to the effect that Julie Bock, a female participant monitoring a job search program at JVS, felt she had suffered sexual harassment when some co-participants made some improper remarks to her. There was no indication that this was authorized or condoned by the prime sponsor or JVS management, however, and I find that there is insufficient evidence to prove this allegation. The Grant Officer's holding on harassment is affirmed.

Complaint on Wrongful Termination for Requesting Information

34. The WAP has terminated a participant when he asked for information on the program.

On the occasion cited to the Grant Officer, Elmer Beirsdorf was allegedly terminated because he could not read a form and he refused to sign it. He became abusive when a JVS staff person refused to read it to him. The Grant Officer learned that Mr. Beirsdorf received a hearing at JVS on May 12, 1978 at which it was determined that he should be re-enrolled, lose no pay and be placed in the academic skills program. The Grant Officer took no further action.

At the hearing before me there was no evidence that participants were terminated just for asking for information about CETA programs. The Grant Officer is affirmed on this issue.

Complaint on Notice of Grievance Hearings.

36. Notices of grievance hearings frequently are not mailed or are not delivered until the day of the hearing or after the hearing is over.

The Grant Officer learned from Mr. Galazan that it was JVS policy to send notices of hearing 10 days prior to the date of the hearing and that grievants have always managed to be present at their hearings. The Grant Officer directed that adequate notification must be given to each complainant of his hearing. I affirm.

Complaints on Results of Grievance Hearings.

36. Decisions reached in grievance hearings are not carried out.

37. Decisions reached in grievance hearings affecting an entire class of participants are not announced to other participants and those decisions do not affect them or their activities in any way.

The Grant Officer learned that in the examples cited, Cherae Rose and Mildred Gillum had filed a grievance with JVS which included an issue pertaining to the amount of their wages during the week they were transferred from Milwaukee County's Pay for Work Program (PFWP) funded with county funds to JVS' WAP which was funded with CETA funds. The Complainants felt that they and others similarly situated should have received corrected pay for that transition week. Michael Obletz, a financial officer at JVS, informed the Grant Officer that Ms. Rose, Ms. Gillum and some 31 other participants had received correctional pay for the transition week and that he had requested from the PFWP a list of participants and their

hours worked during the transition week so any pay inequities could be adjusted. The Grant Officer took no further action on this. I affirm.

Complaint on the WAP Director Holding Hearings

38. The WAP hearing officer is the WAP Director.

The Grant Officer learned that Michael Galazan, who was then executive director of JVS, was the grievance hearing officer for JVS cases. The Grant Officer took no action on this issue. I can see no violation of the Act or regulations in this instance, provided that complainants who are not satisfied with such a JVS director hearing can appeal to higher levels at the prime sponsor, Grant Officer, Administrative Law Judge and judiciary levels. I affirm.

Complaint on Eligibility

43. The WAP transferred participants into CETA directly from other employment programs. These participants were not unemployed at the time of the transfer.

The Grant Officer stated:

> "Until 1978, Milwaukee County, as a condition for receiving general assistance welfare payments (G.A.), required certain GA applicants to perform various tasks for the county, such as assisting county employees in the county institution's laundry room. Such a requirement had been in effect in Milwaukee County since the 1930's. Prior to the inception of the CETA funded Work Assistance Program (WAP), the County program was called the Pay for Work Program . . . . The largest number of enrollees in the program at any time was 682 on June 25, 1977. Those in the program worked 32 hours a week at $2.00 an hour.
>
> Chapter 50 of the County Ordinances stated that '. . . persons found eligible for general assistance . . .

will be referred to the Pay for Work Program.' If the persons were found eligible for assignment they were referred to a '. . . department of the County for employment in the unclassified service or referred to a verified position of employment in industry.' Chapter 50 also provided that if the individual refused to '. . . accept an offer of County or private employment . . . or after accepting employment failed . . . to report to work . . .' or failed to carry out the duties, the Project Director would make a report to the Department of Public Welfare. The Welfare Director would then determine if the applicant would be refused general assistance.

The County has taken the position that Pay for Work participants were welfare recipients, not County employees, and were therefore eligible for CETA. In support of that position, the County supplied citations to Wisconsin statutes and case law providing that PFWP participants, unlike County employees, were not eligible for unemployment compensation, were not accorded collective bargaining rights, and were accorded the same due process protections as general assistance recipients upon termination from the Pay for Work Program. In addition, PFWP participants were never paid more than the minimum wage, and were required to work or lose their welfare eligibility. In the above respects, PFWP participants could be characterized as welfare or workfare participants.

On the other hand, Chapter 50 of the County ordinances described PFWP participants as employees in the County unclassified service, and a review of payroll ledgers revealed that deductions were made from PFWP participants' paychecks for social security and federal and state income tax withholding. Furthermore, payments received by PFWP participants were larger than general assistance payments for equivalent periods. In these respects, PFWP participants partake of the characteristics of employees." (ALJ Exhibit 52)

According to the evidence, from about January to March, 1978, hundreds of persons were transferred directly from the PFWP funded by Milwaukee County to the WAP funded by Titles I, II and VI of CETA and soon thereafter the PFWP went out of existence.

The eligibility requirements for CETA participants in the various Titles of CETA involved here were:

> *Title I.* To be eligible for Title I, an individual had to be economically disadvantaged, unemployed, *or* underemployed. 29 CFR 95.32(a). "Economically disadvantaged" was defined to mean a person who "is a member of a family which receives cash welfare payments under Federal, State or local welfare programs." 29 CFR 94.4(S)(1).
>
> *Title III.* Youth Employment and Training Programs (YETP). To be eligible for Title III (YETP), an individual had to be (1) unemployed as defined in #94.4 (ggg), or underemployed as defined in #94.4 (fff), *or* in-school as defined in #97.702; *and* (2) 16-21 years of age: *and* (3) a member of a family with a total family income at or below 85% of the lower living standard income level, as defined in #94.4 (nnn), 29 CFR 97.714(a).
>
> *Title VI.* To be eligible for Title VI projects, an individual had to be (1) economically disadvantaged as defined in #94.4(S) *or* a member of a family with a total family income at or below 70% of the lower living standard income level as defined in #94.4 (nnn); *and* (2) must meet the residency requirements of #99.38; *and* (3) must have been unemployed for 15 of the 20 weeks immediately prior to application *or* be a member of a family receiving Aid to Families with Dependent Children (AFDC). 29 CFR 99.42(a).

The Grant Officer determined that,

> "Because the County has shown that PFWP participants were involved in a workfare program and

> were not regular County employees, it is my determination that they may be treated as welfare recipients, and thus 'unemployed', for purposes of determining CETA eligibility under federal law. It follows that all participants transfered into Title I of CETA were eligible under the 'economically disadvantaged' criteria cited above, as recipients of cash welfare payments.
>
> Receipt of cash welfare payments, however, is not sufficient to demonstate eligibility for Title III YETP or Title VI." (ALJ Exhibit 52)

As a result, the Grant Officer determined that all CETA funds expended on PFWP transferees into Title III and VI programs should be disallowed and reimbursed to the U.S. Department of Labor unless the prime sponsor could demonstrate the eligibility of those transferees through acceptable individual documentation.

During the hearing before me the record was left open for additional evidence on this issue of eligibility from Ms. Helen Humphrey, DOL federal representative, as well as rebuttal evidence from the Respondent prime sponsor. These have been received and Ms. Humphrey's affidavit is admitted in evidence as Grant Officer's Exhibit 12 and the affidavits of Linda Bell, Pamela Oliver and Michael Obletz are admitted in evidence as Respondents' Exhibits VV, WW and XX respectively. In Ms. Humphrey's affidavit she identified 43 ineligible participants out of a total of 550 transferees. After receiving further evidence submitted by the prime sponsor consisting of supporting adequate documentation, the Grant Officer has conceded that 7 of the 43 were eligible. This leaves some 36 participants the Grant Officer continues to believe were ineligible.

The prime sponsor admits that the following 3 participants were ineligible for Title VI:

David Gerald,	SSN	390-64-1540
Henry McFarling,	SSN	393-70-4843
Lawrence J. Miller,	SSN	393-72-2399

According to 29 CFR 96.25 (1978), made applicable to Title VI by 29 CFR 99.42(c)(1), the prime sponsor is responsible for maintaining adequate documentation of participant eligibility, which "shall consist of a signed and dated complete application for employment, including the last date of employment, which attests that the information in the application is true, to the best of the applicant's knowledge." In the event that no applications are available or not as described above, costs associated with those participants should be disallowed.

The prime sponsor admits that eligibility cannot be determined for the following 6 Title VI participants due to lack of documentation:

Susan Cook,	SSN	393-72-5872
Solomon Harris,	SSN	397-64-6112
Catherine Jones,	SSN	398-62-4841
Vanessa Lea,	SSN	391-70-9602
Virginia Ramsey,	SSN	397-64-6930
Ricky Simmons,	SSN	397-64-7283

The prime sponsor and Grant Officer continue to disagree as to the eligibility of the following 17 participants:

Dennis Chambers,	SSN	392-72-8442
Jesse Cotton,	SSN	389-68-9293
Cheryl Feleniak,	SSN	393-70-2883
Lori Labucki,	SSN	398-76-6782
Leon McNeice,	SSN	399-58-1595
Frederick Morris,	SSN	388-66-1847

Donnie Owens,	SSN	399-64-2829
Millicent Ozier,	SSN	388-66-2432
Annotia Parker,	SSN	393-70-3720
Lori Rogers,	SSN	394-74-7158
Phyllis Russell,	SSN	395-72-7005
Diane Schmitz,	SSN	395-58-8534
Steven Schneider,	SSN	389-66-2652
William Smith,	SSN	426-08-0185
Alfreida Spicer,	SSN	390-70-4973
Tommy Williams,	SSN	387-74-7347
William Yancey,	SSN	390-64-1814

The prime sponsor concedes that these participants were ineligible for Title VI, but claims that no costs were charged to Title VI for them. The prime sponsor does not deny that these participants were initially enrolled in Title VI, nor does it claim that they were initially enrolled in some other title for which they were eligible. The Grant Officer maintains, however, that Ms. Humphrey determined that these 17 participants were initially enrolled in Title VI and initially paid by JVS from that title. Although 16 of them appeared on a JVS payroll for Title III (YETP) in February 1978, the first YETP subgrant from the County to JVS did not become effective until March 1, 1978, so JVS charged the February YETP payroll to Title VI, thus these costs were initially reported under Title VI. Apparently the prime sponsor's contention that no costs were charged to Title VI for these participants is based on the fact that they were part of a group for which costs were later "backed out" from Title VI to Title I. The Grant Officer's response to that is eligibility determinations should be made *before* a participant is enrolled in CETA and the key eligibility question is whether, at the time of application, a participant is eligible for the title in which he or she

is then enrolled. See 29 CFR 99.42(a)(1). Adjustments of the type made here by the prime sponsor cannot retroactively create eligibility. Moreover, any attempt to do so would be contrary to the cost principles of Federal Management Circular 74-4 (Grant Officer's Exhibit 11), codified at 41 CFR Subpart 1-15.7, incorporated by reference in the CETA regulations at 29 CFR 98.12(a). According to 41 CFR 1-15.703-2(b):

> "Any cost allocable to a particular grant or cost objective under the principles provided for in this subpart may not be shifted to other Federal grant programs to overcome fund deficiencies, avoid restrictions imposed by law or grant agreements, or for other reasons."

The prime sponsor and Grant Officer continue to disagree as to the eligibility of the following 2 participants:

Vanessa Davis,	SSN	395-72-3336
Joseph Sornat,	SSN	394-66-4906

Evidence from Ms. Bell for the prime sponsor was that these participants were initially enrolled in Title VI per JVS records, but she did not specify the enrollment dates nor what JVS records were relied upon. Evidence from Ms. Humphrey for the Grant Officer was that these participants first appeared on a JVS CETA payroll in March 1978 and the payroll was for Title III YETP. Both participants were ineligible for Title III because it could not be determined if their respective family incomes were at or below 85% of the lower living standard income level. Therefore, the Grant Officer decided that associated costs should be disallowed.

The prime sponsor and the Grant Officer continue to disagree as to the eligibility of the following 8 participants for Title VI.

Diane Smith,	SSN	393-68-1564
Danieel Jablonski,	SSN	390-56-3995
Reginald King,	SSN	388-66-2380
Ezell Tillis,	SSN	324-52-0709
Lawrence Hudson,	SSN	394-68-6857
Frankie Jude,	SSN	399-62-3869
Johnnie Reed,	SSN	399-74-9646
Carol Wright,	SSN	437-94-4077

The prime sponsor argues that some of these should be eligible because their names appear on the Job Service listing of Title VI eligibles and for other reasons. The Grant Officer determined that all of these remained ineligible because of inadequate documentation to prove their eligibility.

I agree with the contentions and reasoning of the Grant Officer in his final determination on participant eligibility as modified by his brief and reply brief. Therefore, I find that all CETA funds expended on the 36 transferees from the PFWP into Titles III and VI must be disallowed and the prime sponsor will be ordered to reimburse the U.S. Government by check payable to the U.S. Department of Labor for those costs in an amount to be determined by the Grant Officer or his designee and the Grant Officer is directed to determine the amount of such disallowed costs within 60 days.[6]

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[6]In determining the amounts to be disallowed the Grant Officer should act in cooperation with the prime sponsor and JVS and should take into account any subsequent transfers of participants into new titles for which the participants may or may not have been eligible.

Complaints on Work Experience Wages and Benefits[7]

23. The Work Assistance Program does not pay prevailing wages to Title VI participants.

24. Wage rates are uniformly minimum rate and do not reflect the differing requirements of the jobs participants are performing.

25. Work Assistance Program participants are performing tasks of regular public service employees and are still paid at the minimum rate.

2. The Work Assistance Program has failed to provide CETA VI participants with health coverage afforded other employees.

3. The Work Assistance Program has denied CETA VI participants the right to collectively bargain and be covered by existing collective bargaining agreements.

4. The Work Assistance Program has denied CETA participants the opportunity for advancement, cost of living raises, promotion, and other benefits of regular employees.

The Grant Officer found that all work experience participants in Titles I and VI were paid the minimum wages, $2.65 an hour in 1978 and $2.90 an hour in 1979. The Grant Officer determined that, in establishing work experience wage rates, Milwaukee County had not taken into account factors such as the type of work performed, geographic location, and skill proficiency, in violation of Section 95.33-

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[7]Ms. Griswold made a similar complaint involving the failure of WAP to pay CETA participants prevailing wages in her letter of February 20, 1978.

(d)(4)(viii) of the 1976-1977 regulations. These provided in part as follows:

> "Participant benefits. Each participant in a work experience activity shall receive wages. Wages shall be commensurate with such factors as the type of work performed, the geographic region of the program, and the skill proficiency of the participant."

The Grant Officer found that the type of work performed and the skill proficiency of the work experience varied greatly and that in many cases the positions were located in agencies where unsubsidized or public service employees (PSE's) were doing similar work.

The Grant Officer also decided, that the prime sponsor may have violated other regulations including 29 CFR 95.33(d) (4) (viii) (D), 98.24 and 96.34 of the 1977 regulations.[8]

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[8]Section 95.33(d)(4)(viii)(D) provided:

"When a participant in a work experience activity is performing the tasks of regular public service employment type jobs, wages must be comparable to those paid for the regular public service job, as specified in § 96.34."

Section 98.24 provided in part:

"General benefits and working conditions for program participants.

(a) Each participant in an on the job training work experience or public service employment program under the Act shall be assured of workmen's compensation benefits . . . or coverage-under a medical and accident policy for injury or diseases resulting from such participation . . .

(b) Each participant in an on the job training, work experience or public service employment program shall also be assured of health insurance, unemployment insurance (to

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With respect to benefits, the Grant Officer found that WAP work experience participants had been entitled

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the extent such benefits are allowable), coverage under collective bargaining agreements and other benefits at the same levels and to the same extent as other employees similarly employed, and to working conditions and promotional opportunities neither more nor less favorable than such other employees similarly employed . . ."

Section 96.34 provided in part:

"Compensation for participants.

(a) Minimum wage for participants. Each participant shall be paid at rate no less than the highest of the following:

(1) Except where a participant is exempt under sec. 13 of the Fair Labor Standards Act, the minimum hourly wage set out in sec. 6(a)(1) of the Fair Labor Standards Act of 1938, as amended. The exceptions to Section 6(a)(1) shall not apply to public service employment participants, except as provided in paragraph (b).

(2) The State or local minimum wage for the most nearly comparable covered employment;

(3) The prevailing rate of pay for persons employed in similar public occupations by the same employer (sec. 208(a));

(4) The minimum entrance rate for inexperienced workers in the same occupation in the establishment, or, if the occupation is new to the establishment, the prevailing entrance rate for the occupation among other establishments in the community or area, or any minimum rate required by an applicable collective bargaining agreement; or

(5) The prevailing rate established by the Secretary, in accordance with the Davis-Bacon Act, as amended, for participants involved in employment covered by the Davis-Bacon Act as specified in #98.29 of this title . . ."

The regulations effective April 3, 1979 that apply to some of these matters are 20 C.F.R. 676.25-4, 676.26-1, and 676.27.

to workman's compensation, public liability insurance, paid holidays, 22 hours vacation per year, 22 hours sick leave per year and medical services from the County Medical Complex with a delayed payment system. However, more generous benefits were provided to JVS employees covered under the collective bargaining agreement with AFSCME. These included 12-25 vacation days per year, depending on length of service, 1½ working days per month medical leave, hospitalization and medical surgical coverage, life insurance, a pension plan, 10 holidays, 4 or 5 personal days per year, depending on length of services, leaves of absence, unemployment insurance, workman's compensation insurance, automobile liability insurance and professional liability insurance.

The Grant Officer's initial determination ordered the County to classify all work experience jobs in WAP by job titles, duties, responsibilities and supervision, determine the proper wage and benefits under the regulations, and submit the results to the Regional Office for review. The Grant Officer's final determination modified the corrective action to require the County to notify all former CETA participants, by mail and newspaper advertising, to submit claims if they believe they were underpaid. The Worker Rights Institute could also submit specific documentation on individual participants' pay. The claims would then be reviewed by an outside agency, such as the State Job Service or a contractor approved by Region V, DOL, and the agency would notify each participant of the results of its review and the right to appeal to the Office of Administrative Law Judges. Costs both for the record review and back wages could be paid from CETA funds. The prime sponsor did not appeal the Grant Officer's final

determination. The Complainants did appeal the corrective action ordered in the final determination, but not the findings of fact or conclusions of law upon which it was based, since they felt that the burden of determining the proper wages and benefits should more appropriately be placed upon the prime sponsor instead of the individual CETA participants.

At the hearing the Complainants introduced a considerable amount of evidence concerning wages actually paid to WAP participants, as well as some evidence relating to comparable wages in the community and some evidence as to the type of wage records WAP consortium agencies maintained for CETA participants. However, the record definitely lacks the type of detailed evidence needed to permit me to establish the proper wage for each of the approximately 5,400 participants enrolled in WAP between July 1, 1977 and April 1, 1979 (when the regulations changed to permit payments of the minimum wage in almost all work experience positions).

The evidence showed that at the beginning of the WAP program all participants were paid the minimum wage only. However, there was other evidence that a few WAP participants were paid more than the minimum wage. Mr. Obletz testified that beginning in October 1978, if a participant in a production training area of JVS produced enough on a piece rate to earn more than the minimum wage, he was paid the minimum wage from CETA funds plus a supplementary check from non-CETA sources for the additional amount earned. However, according to Messrs. Galazan and Lutzow, this was a rarity and Mr. Dolberg testified that no WAP participants in the food

services area were paid more than the minimum wage. At the other WAP agencies, the participants from Goodwill, Curative and De Paul Sertoma interviewed by Ms. Lorman, a DOL investigator, in late 1978 were all paid minimum wage. Testimony from Goodwill employees indicated that at some later date CETA checks for 22 hours at minimum wage were sometimes supplemented by Goodwill, either for additional pay based on an incentive piece rate, or for additional hours. At Curative, participants could be paid above the minimum wage from non-CETA funds if their production level so warranted, but the evidence indicated that no wage supplementation occurred at De Paul.

According to Ms. Powers, the CETA Director, the prime sponsor itself never classified jobs at the worksites in order to set appropriate wage rates for either PSE or work experience participants, but instead left that task up to each employing agency. The prime sponsor approved WAP subgrants which were budgeted on the basis of minimum wage and it had no set standard on how additional wages would be funded. The practice apparently varied between agencies and over time, and there was no evidence that the prime sponsor ever established or enforced a uniform policy based on anything other than minimum wage.

The evidence also showed that the WAP consortium agencies kept detailed individual records on the production of each WAP participant assigned to a production training area which permit an individualized wage determination based on piece rate times productivity. Piece rates were established based on a community norm for similar work, which could be based on a time study of staff pro-

auctivity and/or information from the State Job Service or private employers. This system relied on the methodology used to calculate wages for handicapped clients in sheltered workshops, who may be paid less than minimum wage under certain conditions established by DOL's Employment Standards Administration. No comparable records were maintained for participants in nonproduction areas, although at JVS, evaluation forms were used to estimate a percentage of the community norm at which each participant was functioning.

There was some evidence as to community wage rates for comparable work. With respect to food service wages, Albert Grant, who provided senior citizens meals to the County in competition with JVS, testified he paid his employees minimum wage plus workmen's compensation and unemployment compensation with a possible 50 cents an hour raise after 6 months on the job. There was other evidence on private industry wage rates from four companies in the Milwaukee area: E. R. Wagner, Ben Turick, Allen Bradley, and General Electric. Each of these had had subcontracts with one or more of the WAP consortium agencies. However, this evidence was not sufficiently specific to show that any particular group of CETA participants had performed a task identical to that performed by regular company employees at a specified wage rate.

As in the case of eligibility requirements, the regulations governing wages vary from title to title of CETA. Since the Title III (YETP) regulations expressly encourage payment of the minimum wage "whenever feasible," Title III wages are not in controversy. For Title VI projects, wages must be the highest of the rates speci-

fied in 29 C.F.R. 95.33(d)(4)(viii) or "the prevailing rates of pay for persons employed in similar occupations by the same employer." 29 CFR 99.37(e). As applied to WAP, persons similarly employed by the same employer could include handicapped clients, PSE's, or agency staff, a determination which would have to be made on a case-by-case basis. It should be noted that under this regulation, only jobs within the same employing agency may be compared, and thus wages at outside firms, such as Allen Bradley or G.E., are irrelevant.

Under 29 CFR 95.33(d)(4)(viii), which applied to Titles I and VI (if higher than the alternative just mentioned), wages "shall be commensurate with the type of work performed, the geographic region of the program, and the skill proficiency of the participant," with the minimum wage as a floor. This standard does allow for comparisons with the private sector in the community. For example, if entry level food service wages in the Milwaukee area are generally minimum wage, it would be acceptable to pay minimum wage to work experience participants doing the same type of work. Another example is the G.E. line. If WAP participants performed the same work as "B" assemblers at the local G.E. plant, at the same level of skill and speed, they should be paid a commensurate wage. On the other hand, if they only packed rather than assembled an item; or performed a task by breaking it down into a series of simple operations each done by one person; or worked only half as fast, or were allowed twice as many mistakes, or required 3 times as much supervision, they should probably be paid less. The evidence in this case does not contain the detailed information re-

quired for me to be able to make such individual wage determinations.

With respect to benefits, the applicable regulation for all 3 titles is 29 CFR 98.24(b), the so-called "equal benefits" regulation. Applying this regulation involves identifying similarly employed employees of the same employer, whose benefits must also be afforded to CETA participants. The regulation lists certain factors to be considered in making this determination: employment status, type of work performed, job classification, and method of appointment to the position. Again, the evidence in this case is not sufficient for me to make this determination for each of WAP's work experience positions. As a matter of fact, there was evidence that, at JVS, at least WAP participants were *not* similarly employed to regular JVS staff and PSE's.

In this case, in my opinion, the remedy proposed by the Grant Officer in his initial determination is far more appropriate than that contained in his final determination. the initial determination placed the burden of evaluating jobs and calculating wages on the prime sponsor, which could have avoided the problem by following the regulations in the first place, and which has better access to the necessary information than former participants.[9]

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[9]During the hearing there was evidence that the consortium agencies had records confirming the details of the work performed, the specific content and nature of the work, the duration of each contract, the number of units in the contract, the cost of the contract, the number and name of each person working on each contract, the hours they spent on each contract and their rate of production. Also maintained was the location of

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Therefore, that portion of the Grant Officer's final determination pertaining to the corrective action is modified to require the prime sponsor to classify all the work experience jobs in the WAP by job titles, duties, responsibilities and supervision, determine the proper wages and benefits under the regulations and submit the results to Region V DOL for review within 60 days of the date of this decision. The Regional office shall have 30 days after that to review those results and the prime sponsor shall have 30 days thereafter to compensate all former CETA participants who had been underpaid, as determined by DOL, under provisions of the regulations who can be located. If, due to changed circumstances, federal funds are not available for back wages and the expenses involved in determining the amount of such wages, then the prime sponsor must pay these out of its own funds. Except for these modifications the Grant Officer's determination on work experience wages and benefits is affirmed.

Complaint on Failure to Pay WAP Participants.

5. The WAP has failed to pay many participants in the program.[10]

The Grant Officer discovered that while JVS paid WAP participants in Titles II, III and VI programs by check, for Title I participants, the checks were issued by

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each outstationed job site, the type of work done there, the number of slots at each site and the number and name of each person there, as well as their hours for the duration of their placement. All this information is readily retrievable through several existing computer programs.

[10]There was a similar complaint filed on February 20, 1978.

the State of Wisconsin's Department of Industry, Labor and Human Relations. These Title I checks were mailed from the state capital, Madison, Wis., to the Title I WAP participants who lived in Milwaukee County. Checks mailed from Madison in 1978 were frequently lost and occasionally stolen from participants' mail boxes. There were also a few Title II and VI paychecks from JVS reported lost, late, or stolen. JVS developed a procedure for handling these cases by verifying that the participant worked during the week in question, seeing that there is documentation of the participant's time in his file, and determining from Madison whether and when a check was issued. If the check was issued and the participant signed an affidavit to the effect that he had not received the check, JVS then issued an advance to the participant for the amount of his wages out of non-CETA funds. JVS also issued corrective (if the participant could verify the hours he worked) and emergency (rent, eviction, death in family, etc.) checks out of non-CETA funds. For Title I participants repayment was handled as for a lost, stolen or late check. For Title III and VI cases the amount advanced was deducted from the next pay period. The Grant Officer decided that proper corrective action had been taken and there was no violation of the Act, regulations or grant. I affirm.

Complaint on Pay Below Minimum Wage

6. The WAP has failed to pay some participants at the minimum wage rate.

The Grant Officer found there were two problem areas:

a. In January and February 1978 when the PFWP participants were transferred to WAP, the PFWP participants were paid $2. an hour, while the WAP participants were paid the $2.65 minimum wage for less hours. Some participants were mistakenly paid only $2. an hour for the full transition week. Corrective checks were sent to some 31 participants to correct the improper, below minimum wage, payments for hours worked under CETA during the transition week.

b. Some work experience participants working in sheltered workshops were allowed to work overtime. The overtime was paid at a rate similar to regular, non-CETA handicapped clients of JVS, which in some cases was below minimum wage. When this was brought to the attention of JVS officials, corrective checks were issued to bring the overtime work up to minimum wage.

The Grant Officer determined that proper corrective action was taken and there appeared to be no intent to violate the Act or regulations. I affirm.

Complaints on Placements

11. Inappropriate placements are being made by the Work Assistance Program.

12. Most placements after training are in the lower wage positions.

42. Information on participant placement in non-subsidized employment is deliberately obscured.

The Grant Officer reviewed WAP Titles I and VI placement statistics for fiscal years 1977, 1978 and 1979 and found some placements of participants in unsubsidized employment positions paying less than the minimum wage. Although the regulations do not require that a specific

percentage of CETA participants be placed at any particular wage level, the Grant Officer pointed out that the purpose of the Act, to assure that training and other services lead to maximum employment opportunities and enhance self-sufficiency, is not furthered by subminimum wage placements which may result in a return to welfare. He also encouraged the prime sponsor to be responsive to reasonable information requests from the public, including requests for placement data.

Evidence was introduced at the hearing that showed that there were several different and conflicting definitions of placement in use in Milwaukee County in connection with the WAP by the state Job Service, Diamond C's investigation of the WAP, definitions for CETA reporting, and several used by JVS. To some extent this resultdd in the different statistics from the various agencies on placements of participants.

Under Sections 211(b) and 602(c) of the 1973 Act, the Department of Labor is specifically prohibited from imposing any specific placement quotas for Titles II and VI participants as a condition for receipt of financial assistance. Placement goals may be established, but these may also be waived by DOL if local conditions warrant. However DOL is interested in accurate reporting of placement data by prime sponsors and whether placement goals are met. Ms. Helen Humphrey, federal representative for Milwaukee County, testified that the County has recently improved its reporting by computerizing the CETA reporting system and that she had no reason to believe the County was deliberately inflating or falsifying any placement data reported to DOL. In my opinion the Complainants have proved no violation of the Act or regulations

pertaining to placements and the Grant Officer's determination on this matter is affirmed.

Complainant on Training

8. The WAP does not provide appropriate training to most participants.

The Grant Officer noted that JVS tested WAP participants upon their entry into the program to determine what their skills, abilities and needs were in order to determine what CETA services would best serve the participant. Although he noted several examples of inappropriate placements of participants in various WAP components, he found no violation of the Act, regulations or grant. He reminded the prime sponsor of the provision of the Act requiring it to offer appropriate training (Section 121(f)(3) and (4))[11] and decided that the County was taking appropriate action through its expanding job placement program and job clubs.

At the hearing the evidence showed that work experience positions at JVS included production training (industrial subcontract assembly work), food service, maintenance, Project Clean (domestic work), print shop and typewriter repair. However, most of these programs were not intended to teach specific skills, but were used to get

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[11]Section 121(f)(3) and (4) provides:

"(3) All programs shall be designed, to the maximum extent practicable, consistent with every individual's fullest capabilities, to lead to employment opportunities enabling participants to increase their earned income and to become economically self-sufficient.

(4) No person shall be referred for training unless there is a reasonable expectation of employment in the occupation for which such person is being trained."

the participant used to a work environment. Many of the participants were not easily trainable, some had alcohol or drug abuse problems, some suffered from mental handicaps or emotional disturbances, and the average WAP participant was a high school dropout with a 6th to 8th grade reading level.

It has been held that a CETA participant is not entitled to any specific course of training upon being accepted for participation in a CETA program. *Paul E. Barnsley*, 80-CETA-91 (January 12, 1982) and see *Irving Siegel*, 79-CETA-26 (March 18, 1981). While I agree with the Complainants that in some cases the training of CETA participants left much to be desired, I do not feel that any overall generalized flagrant or intentional violation of the Act or regulations has been proven. The Grant Officer's determination on training is affirmed.

Complaint on Lack of Supportive Services

31. There are no supportive services provided.

The Grant Officer found that the CETA Title I and Title VI subgrants to JVS provided only for participant allowances and wages, with some minor administrative costs. Supportative services were provided under the Title XX contract with the Milwaukee County Department of Jublic Welfare funded by the state and the U.S. Department of Health and Human Services (HHS). The contract listed 11 supportive services including adult day care, advocacy, child day care, counseling, diagnosis and evaluation, education and training, health related, home and financial management, housing, sheltered employment and transportation. The Grant Officer found no violation of the Act, regulations or grant.

The Act and regulations do not require that supportive services be provided to every CETA participant; this decision is up to the prime sponsor. See 29 C.F.R. 95.33 and Section 811 of the 1973 Act. At the hearing there was evidence that some supportative services were provided to some CETA participants. Even though certain participants may not have received certain services, since this complaint does not state a claim upon which relief can be granted under CETA, the Grant Officer's determination is affirmed.

Complaints on Title Switches[12]

20. No comprehensive plan is followed. Participants are shunted from one program to another solely on the basis of funding schedules.

22. The Work Assistance Program transferred participants into the Work Assistance Program and cut the number of hours they were allowed to work, thereby lowering their take home wages.

32. Participants are switched from one CETA title to another without being informed that such a change has taken place.

The Grant Officer found that several intertitle transfers had occurred in WAP: PSE's were switched from Title VI to Title II in February 1978 to separate the PSE's from the work experience positions, and youths were moved from Title VI to Title III about March 1978, as

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[12]There were similar complaints made in the February 20, 1978 letter of complaint.

it was felt that youths would have better opportunities for transition with community based organizations. Although such transfers did not violate the Act, regulations or grant, the Grant Officer properly reminded the prime sponsor that participants should be notified of intertitle transfers.

Some participants in the County's now defunct Pay for Work program were transferred into the WAP under the work experience component. Their hours were cut from 32 per week under PFWP to 22 under WAP, but their wages were changed from $2.00 per hour to $2.65. The WAP transferees were also furnished a bus pass worth $5.00 as a supportive service, and when this was added to their WAP wages the participants received almost as much as they had in the PFWP. The reason given for cutting the hours of work in this transfer was to allow for the maximum amount of people to benefit from the program. This transfer has been discussed previously under complaints on eligibility and will be covered further under maintenance of effort complaints. As noted above, none of the switches between CETA titles violated the Act or regulations and the Grant Officer's determination on this matter is affirmed.

Complaints on Contracting[13]

44. For many months there were no contracts on file between Milwaukee County and the Rehabilitation Council (CETA VI) and Milwaukee County and JVS (CETA I). Consequently, federal monies have been distributed to

[13]There were similar complaints made in the complaint letter of February 20, 1978.

program operators who have not signed assurances and certifications to prevent abuses. The Regional Office was informed and refused to take action.

45. Contracts have commonly been written 6 months after the programs have gone into effect.

The Grant Officer found 4 specific subgrants for fiscal year 1978 between the prime sponsor and either JVS or the Rehabilitation Council which had been signed after the effective date of program start-up, including two that were signed 6 months later. The Grant Officer found that this demonstrated poor program management inconsistent with maintaining a proper accountability for funds. In general, contracting procedures were covered by 29 CFR 98.27 and 98.31 and 20 CFR 676.38 of the April 3, 1979 regulations.

In 1977, a competitive bidding process was used for the Title VI contract (Handicapped Serving the Handicapped), but not for the Title I contract (Learn to Earn). Ms. Powers testified that requests for proposals were not required under Title I at that time. This was correct; under the regulations then in effect, selection of subgrantees was exempt from the competitive bidding requirements, 29 CFR 98.20(a)(3), and project approval was different because of the specific requirements of 29 CFR 99.41.

With respect to the prime sponsor's timeliness in executing subgrants, the evidence showed that this has been a chronic problem which continued in fiscal years 1979 and 1980. Ms. Humphrey, the DOL federal representative, recommended 2 actions the prime sponsor could take to ameliorate this situation: (1) to shift all the subgrants from a fiscal to a calendar year basis to compensate for

uncertainties in federal funding, and (2) to execute a timely grant signature sheet, with back up materials of the grant contract to follow if not then completely prepared. These steps have both been taken by the prime sponsor. In my opinion the evidence does not show that any actual specific harm was done in this instance due to the late signing of the subgrant contracts that would not have occurred if these had been signed on their effective dates, although there is no doubt this constituted poor practice. The Grant Officer's determination on contracting is modified to require the prime sponsor to continue to take corrective action to have subgrant contracts written and signed on or before their effective dates.

Complaint on Title III

21. The Work Assistance Program placed more than 100 young people into a CETA III program in January and February (1978). There was no CETA III program or money in Milwaukee County until April, 1978. Repeated requests for information and clarification brought no answers from the program operator, the local CETA office, the prime sponsor, and the regional director.

The Grant Officer found that Milwaukee County's Title III Youth Employment and Training Program (YETP) and Youth Community Conservation and Improvement Project (YCCIP) grants were signed on December 27, 1977 and that youths in the Work Assistance Program were transferred to Title III in the spring of 1978. Although the transfers created some confusion, there was no violation of the Act, regulations, or grant.

At the hearing, Ms. Powers testified that, although the prime sponsor received Title III grants in December 1977,

the subgrants were not all finalized until April 1978. The record contains no evidence that anyone was harmed by this situation, or that CETA funds were expended in violation of the Act, regulations, or grant agreements. I affirm.

Complaints on Planning

39. Community based organizations were not consulted in designing the Work Assistance Program.

40. Appropriate labor organizations were not consulted in designing the Work Assistance Program.

41. The CETA Advisory Council was disbanded for 9 months and was not consulted in designing the Work Assistance Program until the contracts had already been signed, the program was underway, and monies were being disbursed.

The 1977 regulations at 29 CFR 95.14(b)(2)(i)(c)(5)(iv) provided that prime sponsors include in their Title I grant applications "a description of the participation of community based organizations in the program plan." The Grant Officer found that, in its Comprehensive Manpower Plan for fiscal year (FY) 1977, Milwaukee County provided community based organizations (CBO's) input by their participation on the planning council. In the FY 1978 agreement this was expanded to allow CBO's to provide input through participation on the council, running CETA programs, and participation when the staff of Milwaukee County or the planning council met to formulate plans. However, between November, 1976 and June, 1977, the County CETA Advisory Council was reconstituted and no meetings were held during the major period of planning

for the Work Assistance Program. The Grant Officer further found that the council, which reviewed all project proposals for FY 1978, included representatives from 7 CBO's. Accordingly, he directed that the County assure proper consultation with CBO's and the Advisory Council in planning programs.[14]

The evidence at the hearing showed that the old Manpower Planning Council held its last meeting in October, 1976 and did not approve any of the programs which became the Work Assistance Program. The new CETA Advisory Council, which was appointed by County Executive O'Donnell, held its first meeting in June, 1977. In the interim, the Title I proposal, Learn to Earn, was reviewed by the Executive Council for Economic Resource Development, composed primarily of business and labor representatives, but this council did not meet the regulatory requirements for a CETA Advisory Council. The new CETA Advisory Council reviewed and approved the Title VI projects, including Handicapped Serving the Handicapped.

Although technically 29 CFR 95.13 requires only that the planning council be consulted in the development of the prime sponsor's grant application to DOL, not subgrants by the prime sponsor, the spirit of the regulation was violated by the lack of input from the advisory council, CBO's and the population to be served in planning the Learn to Earn program.

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[14]In a related case, based upon some of the same facts, it was held in Worker Rights Institute v. Milwaukee County, 79-CETA-288 (May 26, 1981) that community based organizations were adequately consulted by the prime sponsor during the FY 1979 public service employment funding process and that the Act and CETA regulations were not violated in that respect.

With respect to the complaint on labor union consultation, the Grant Officer found that the prime sponsor first sent copies of the Title I grant application for FY 1978 to the Milwaukee County Labor Council (AFL-CIO) and Milwaukee District Council 48, AFSCME on August 25, 1977. Then on September 8, 1977 copies of the Titles II and VI grant applications were first sent to the same unions. He found that, at least with respect to Titles II and VI, the County violated 29 CFR 95.15(c) by failing to distribute copies to appropriate unions 30 days before submission to the Regional Administrator.

District Council 48 of AFSCME includes both Local 594, which represents county employees, including employees of the Department of Social Services, and Local 1954, which includes JVS employees. The CETA Advisory Council had no AFSCME representative between 1976 and 1980. Neither JVS nor the prime sponsor consulted AFSCME officials regarding program design or made available copies of subgrant proposals prior to the inception of the Learn to Earn and Handicapped Serving the Handicapped programs. Discussions with the respective union locals did occur regarding the status of the Pay for Work staff and the incorporation of CETA PSE's in the JVS bargaining unit.

Since the opportunity for community and labor input was to be through the CETA Advisory Council and since AFSCME had no representatives on that council during this period, the requirement of 29 CFR 99.41(b)(7) that "appropriate labor organizations should be consulted in the design of projects where collective bargaining agreements exist with the employing agency," was not met. I

find that the Complainants are correct in alleging that appropriate labor organizations were not consulted in designing the Work Assistance Program.

More recently, the prime sponsor has made an effort to improve consultation and communication with area labor unions. Examples include discussions with the Machinists regarding the General Electric line at JVS, the Boilermakers, and the Steelworkers, facilitated through Ms. Nellie Wilson of the Labor Council. Another example involved the laundry workers local and the Ben Turick Co. I affirm the Grant Officer's determination to the effect that the prime sponsor must consult with area labor unions and community based organizations in planning programs. Henceforth the provisions of 20 CFR 676.12 and 676.24 of the 1979 regulations must be followed strictly.

Complaints of Cherae Rose and Mildred Gillum[15]

Cherae Rose and Mildred Gillum were participants in the Milwaukee County Pay for Work Program, working in the Handicraft Division as seamtresses. In January 1978, when the PFWP was being terminated, these Complainants were transferred into JVS' Title VI work experience program. They were simply kept at the same jobs they had under the PFWP, sewing "pinna-folds" or "pinnies". Their hours of work were reduced from 32 per week under the PFWP to 22, but the pay rate was increased from $2. per hour to the minimum wage of $2.65

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[15]A complaint of Roswitha Peters was handled in a separate case, *Peters v. Milwaukee County*, Case No. 79-CETA-198 (March 24, 1981). That decision was affirmed by the U.S. Court of Appeals for the Seventh Circuit in *Milwaukee County v. Peters et al*, 682 F.2d 609 (7th Cir. 1982).

and they received a bus pass. About March or April 1978 these Complainants, together with all other CETA employees under 21 years of age, were placed in a Title III YETP program with the Social Development Commission. These Complainants contended they should have been paid at the same rate as County Civil Service seamtresses, that their working hours should not have been reduced, that they were not provided with information about the WAP they were in, that there were violations of the CETA maintenance of effort regulations, and that their transfer from the Title VI program to Title III was improper. The Grant Officer determined that wages for lost sick and vacation time had been paid. He commented that the issues of comparability of duties and wages for work experience participants had been discussed elsewhere in his final determination and corrective action was being required for that. In other respects the Grant Officer found no violations of the Act, regulations or grant. He decided that the positions these Complainants held were not comparable to County positions of Seamstress I or II.

At the hearing before me Ms. Rose testified, but Ms. Gillum did not appear. Ms. Rose reiterated her story about having entered the PFWP in December, 1977, working in the Art and Handicraft departments in the basement of the Welfare Building. She made puzzles and silk screening and did sewing and painting. She had two years of college, studying nursing and she had studied sewing and drawing in school. She was transferred from the PFWP to JVS in January, 1978 and continued working in the same place, doing the same job, for the same supervisor. She received a JVS information booklet, but there were some blank spaces in it and she did not find out all the infor-

mation on rights and benefits she wanted to know. At a grievance hearing before Mr. Galazan she still did not get answers to all her questions. In April she was transferred to a Title III CETA Youth program at the Social Development Commission, but when she went there she was just 21 years old, so she was not accepted there. She was terminated and within a month found a new job, outside, on her own, as a salesperson at Lane Bryant and a part time model. She has also been a cashier. She received letters inviting her back to the CETA program, but she decided not to go. Except for her complaints involving wages and maintenance of effort, which are covered elsewhere in this decision, I affirm the Grant Officer's determination pertaining to Ms. Rose and Ms. Gillum.

Complaints of Sarah Carr

This Complainant is a woman in her 50's. Prior to her participation in the CETA funded work experience program operated by JVS, she had been receiving general assistance (welfare) benefits from Milwaukee County since 1973. JVS was the "lead agency" of the Rehabilitation Council of Greater Milwaukee which operated the WAP. Beginning in 1977 all Milwaukee County general assistance recipients were referred to JVS for placement in that program. This Complainant was referred for intake and orientation at JVS in July, 1977, she underwent psychological testing and thereafter she was placed in the Mobile Meals (food service) program in August, 1977. She worked there for a year, until August, 1978, at which time JVS acceded to her request to be placed in the Job Search Program. She complained that she was not provided access to the tests and other material in her file at JVS,

but prior to her hearing at the prime sponsor's level she was given access to her file. She also requested an additional $5. a week wages in lieu of a bus pass during the period when there was a bus strike at the Milwaukee County Transit System. The Grant Officer decided that the $5. bus passes given to CETA participants were funded out of Title XX as support services, not in-kind wages. She also complained about her rate of pay and that JVS did not provide appropriate training and placement services to her. She was transferred to Job Search and the Grant Officer felt this was the only available remedy involving placement. She claimed she was harassed at JVS[1] and classified as handicapped. Her counselor stated that the Complainant had not been identified as either handicapped or disabled by JVS; on the other hand her records did indicate that she could not work full time due to arthritis, diabetes, a heart problem and a bad back. The Complainant, herself, had indicated she should be considered disabled and be put back on general assistance. She had applied for SSI. She objected to having a job title of "salad maker", although her supervisor, Ms. Thomas, said her job was to prepare salads and sandwiches. The Grant Officer found no violation of the Act, regulations or grant in her case.

At the hearing Ms. Carr repeated the same testimony she had given at the prime sponsor and Grant Officer levels. Her work in the JVS Food Service section consisted of making salads and sandwiches, putting them in bags and measuring diabetic foods. She, herself, is a diabetic. Some of the workers who worked with her in an assembly line were handicapped, including mentally retarded persons, others were CETA participants. Some-

times she had trouble getting her paychecks on time, but she filed grievances and got that corrected. She said she was told she had to take the psychological tests to stay in the program, so she took them. She claimed that she saw a document in her file at JVS that said she was handicapped and another that said she was working 30 hours a week when she was actually only working 22. During the bus strike, she received only $1.35 an hour for her overtime, but later she was paid over $60 in back pay for that time. After she left Job Search she finally began receiving Social Security payments. Her evaluation in her file stated she was performing at 50% of the community norm. She said she was unable to do any lifting, she has diabetes, a heart problem, hypertension, arthritis and back and foot problems. She said she was unable to work now.

Her supervisor, Ms. Thomas, said that Ms. Carr was a good worker for up to 3-4 hours a day, but after that she had to sit down and rest for the remainder of her work time. Although the JVS training schedule called for the Food Service workers to rotate in the various departments, such as the commissary dept., the cooking and baking department, etc. Ms. Carr had refused to go and insisted on staying in the salad and sandwich department. Ms. Thomas said the CETA workers had to be trained how to cut meat and sandwiches correctly. Because she thought Ms. Carr could only work 3-4 hours a day rather than a normal 8 hour day Ms. Thomas evaluated her as performing at a 50% production rate.

The issues involving wages and testing are discussed elsewhere in this decision. The Grant Officer's determination concerning Ms. Carr's other complaints is affirmed.

Complaints of Jerry Thomas

Even though I was promised an appropriate placement, I have not received one. I have received no training.

Even though I was promised back pay owed me since March, I have not received it. Even though Section III of the CETA Act provides for a 40 hour work week, I have been limited to 20 to 22 hours of work a week. The prime sponsor has not been able to produce the waiver exempting JVS from 40 hours of work. Therefore, I demand payment of wages up to 40 hours per week, plus interest from my induction in the program to the present and from now on.

I have not been reimbursed for my expenses wrongly incurred relating to my health.

I was forced to take psychological and intelligence tests against my will and under adverse conditions, and the tests were administered and evaluated by unqualified persons.

I was involuntarily enrolled for Title XX services.

The Grant Officer determined that this Complainant entered Milwaukee's Title I program about March 31, 1978. On June 2, 1978 he was transferred to Title VI work experience. On January 29, 1979, he was referred back to Title I Job Search. On January 12, 1979 he was assigned to the SER Learn to Earn Component beginning January 22, 1979, but he failed to report there. On January 29, a letter was sent to him telling him to contact JVS or he would be terminated. On February 15, 1979, he was terminated for lack of attendance. The Grant Officer decided that JVS had transferred this Complainant a number of

times in trying to place him in a component from which he could get a job or adequate training. The Grant Officer thought the Complainant's refusal to participate and his ultimate termination from the program were the reasons for his lack of success.

Concerning the matter of back pay, the Grant Officer found that this Complainant had been issued an advance of $159.00 from JVS funds and he had not repaid that, so he still owed JVS that amount. Concerning his demand for payment for a 40-hour week instead of 20-22 hours, Section 111(a) of the 1973 CETA Act, relied upon by the Complainant, provided that the prime sponsor *may* waive the payment of all or part of the allowances when the waiver will promote the purposes of the Act. The Grant Officer decided that Section 111 did not apply to this Complainant and waivers of a participant's allowance referred to in 29 CFR 95.34(j). This Compainant's allowances were not waived; instead he was paid only for those hours in which he participated in the CETA program. In the subgrant contracts between the prime sponsor and JVS, participation under Title I was limited to 20 hours per week and under Title VI to 22 hours per week. The Grant Officer held that the CETA regulations do not require that every participant must be allowed to participate in the program for 40 hours per week.

As to expenses incurred by this Complainant relating to his health, he is contending that he should be reimbursed by CETA for medical services he received for a back injury from an automobile crash in 1975 when he was a *non-CETA* security guard at JVS, according to the Grant Officer. Supportive services under the WAP are paid

for out of Title XX funds; CETA pays only wages, fringe benefits and allowances for participants. An agreement was made with Milwaukee County General Hospital that medical services would be made available to WAP participants on a delayed payment system. Participants are required to pay the bill for services rendered whenever the participants are able to do so.

Concerning the psychological and intelligence testing of this Complainant, the Grant Officer learned that this Complainant's tests had been shredded at his request. As to his enrollment for Title XX services, all WAP participants were so enrolled. The Compainant signed a form accepting Title XX enrollment. Title XX supplies funds to pay for supportive services for the benfit of CETA participants, such as counseling, transportation, education and training, diagnosis and evaluation, child day care services, etc. The Grant Officer concluded that there had been no violation of the Act, regulations or grant pertaining to Complainant Thomas' complaints.

At the hearing before me a statement from this Complainant was admitted in evidence. In the statement he explained how he had arrived in Milwaukee after his release from the state prison, he had no money and when he applied for general assistance he was referred to the JVS Job Search program where he received an allowance of about $62.00 a week and a bus pass. He followed the rules of the WAP program for a time, searching for a job and working with a counselor who arranged job interviews for him. He said he sometimes had trouble getting paid in the WAP and he was transferred around several times. He received a loan or advance from JVS and they took the money out

of his next check, but the checks came from Madison and sometimes there were mixups in receiving checks. He had no driver's license when he was in the WAP and he thought that he should have been furnished the money for liability insurance, the use of a vehicle to take the road test, and the money for the license, but he was told that JVS did not offer such assistance. He also thought he should have been furnished some appropriate clothing so he could make a good appearance at job interviews. His medical problems included bronchitis and an injury to his back. He was in several hospitals and transferred himself from Milwaukee County General Hospital to University Hospital in Madison because he felt he would get better treatment at University. When he sought reimbursement from JVS he was told that JVS could only cover him for treatment at Milwaukee County General and that if he went to other hospitals it would be at his own expense. The Complainant felt that the treatment he received at Milwaukee County General was wrong and he said he was once punched in the back by a nurse there. When he left the CETA program he was told that his CETA eligibility was expired. After he left he obtained a job as a security guard. He did not think the WAP had helped him in finding work. He thought the psychological and I.Q. testing he had taken was improper, but he was told he had to take it or he would not be paid and would be thrown out of the program, so he signed a consent form and took the tests. (Complainant's Ex. 61). I find no violation of the Act, the regulations or grant and the Grant Officer's determination as to Mr. Thomas is affirmed.

Complaints on Information Requests and Access to Records

33. The Work Assistance Program has denied participants' requests for access to their files and records.

55. The Prime Sponsor has refused to provide documents accounting for expenditures of funds by the Work Assistance Program.

The Grant Officer determined that it was JVS policy to allow CETA participants to review their own files, except for records from the state Division of Vocational Rehabilitation and Department of Mental Health, a policy which the Grant Officer found reasonable. With respect to financial information, the Grant Officer stated:

> "If Milwaukee County has received information requests from the County Board, Ms. Griswold or anyone else which are covered by the Act as quoted above[16] and these requests have not been responded to, Milwaukee County should immediately supply the requested information. . ."

At the hearing, the evidence showed that the Complainants made numerous requests for an enormous amount of information and documents. The prime sponsor supplied them with a great deal, although not always as quickly as the Complainants would have liked. See Respondents' Ex. V. Ms. Powers testified that the prime sponsor never refused to make available for inspection any completed grant. The evidence does not indicate whether the Complainants ever offered to pay the reproduction costs for their volum-

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[16]The section quoted by the Grant Officer was part of 704(d) of the 1973 Act, as follows:

> "Financial records of a prime sponsor relating to public service employment programs assisted under the Act . . . shall be maintained and made available to the public."

inous document requests (such as their request for all Region V CETA letters), and neither the Act nor the regulations required prime sponsors to provide free copies of every document generated by the CETA program to anyone who asks. Moreover, reproduction of documents takes time of the employee who does it, the prime sponsor had a small staff, and its staff may well have been reluctant to have to interrupt more important duties to make copies of large amounts of documents immediately every time there was a request for them. I affirm the Grant Officer's final determination that, in general, reasonable efforts were made to supply the Complainants with their information requests.

Complaint involving whether the WAP is a "Project"

The Title VI WAP program does not meet the requirements of a "project."

The Grant Officer found that Milwaukee County had funded the WAP as a Title VI project through a series of Title VI subgrants over a 20-month period from July 1, 1977 to March 31, 1979. PSE positions were transferred out of the Title VI subgrant to a Title II subgrant effective February 1, 1978. The term "project" was defined in Section 94.4 (000) of the 1977 regulations as:

". . . a definable task or group of related tasks which:

(1) Will be completed within a definable period, not exceeding one year;

(2) Will have a public service objective;

(3) Will result in a specific product or accomplishment; and

(4) Would otherwise not be done with existing funds."

Also 29 C.F.R. 99.41 (a) provided:

> "Funds remaining after funds are reserved for supporting the level of opportunities determined in § 99.40 (a)(1) shall be utilized for public service jobs in new projects, as defined in § 94.4(000), not to exceed one year in duration. (As part of these new projects, prime sponsors may utilize those funds for manpower program activities as described in § 95.33(d) (1), (2), (4), (5), (6) and (7) of this title (sec. 607(b)))."

The Grant Officer determined that the WAP did not meet the statutory and regulatory requirements for a project because:

1. It did not result in a specific product or accomplishment within a definable period, as required by 29 CFR 94.4 (000) (1) and (3), since, he stated, "there are still people on General Assistance in Milwaukee County and probably always will be";
2. It operated for approximately 15 months with no PSE component, in violation of 29 C.F.R. 99.41 (a); and
3. It exceeded the maximum durational limitation for projects by about 2 months beyond the allowable 18 months, in violation of 29 C.F.R. 94.4(000) (1).

The Grant Officer concluded that, since the only remedy available for correcting the violation would be disallowance of all costs associated with the project, no remedy or sanction should be applied. However, he advised Milwaukee County of the violation of the regulations and cautioned that future projects funded must meet the requirements of the regulation.

It should be noted here that Section 607(b) of the 1973 Act as amended limited projects to 12 months, a restriction incorporated in the regulations at 29 C.F.R. 94.4(000) (1), but when the new Act was passed on October 27, 1978, projects were extended to 18 months. The WAP, however, had

exceeded the 12 month limitation well before the new Act was passed. The regulatory requirement that a project include a PSE component was also based on Section 607(b) of the Act, which authorized project money for "public service jobs," and reflected the intent of Congress to provide emergency public service employment under Title VI.

The Respondent prime sponsor, in its brief, contended that the definable "task or group of related tasks" referred to in the regulation was not, as the Grant Officer thought, getting all welfare recipients off the General Assistance rolls and onto the payroll of employing agencies. Instead, it was simply enhancing the employability of a large number of welfare recipients by providing them with employment and training services. The prime sponsor argued that this "task" was completable "within a definable period," i.e., the period of duration of the grant. Furthermore, the WAP had a "public service objective", as 29 C.F.R. 94.4(tt) provided in pertinent part:

> " 'Public service shall mean service normally provided by government and includes, but is not limited to, work in such fields as . . . manpower services . . . and other fields of human betterment and community improvement. *It includes part-time work for individuals who are unable to work full-time because of* age, handicap or *other factors.* It excludes building and highway construction work (except that which is normally performed by the prime sponsor or eligible applicant) and other work which inures primarily to the benefit of a private profit making organization." [Emphasis supplied.]

Finally, the prime sponsor urges, the WAP "would otherwise not be done with existing funds," and it could not

have been operated without funds made available by the Department of Labor, under the CETA. In addition, the mere fact that the project lasted beyond the 18 months duration limit should not strip the program of its essence as being a "project." The 2-month delay was in large measure the delays in passage of new CETA fund authorizations in Congress and issuance of new regulations by the DOL, rather than from any fault of the prime sponsor.

Certainly, it is true that at the hearing, on the issue of whether the WAP met the definition of project, the evidence from Ms. Powers, as well as DOL witnesses, such as Mr. Ross and Mr. Kane, formerly of the Region V office, showed that the standard was vague and difficult to enforce. Moreover, it appeared that uncertainty as to project requirements was not limited to Milwaukee County and that other prime sponsors throughout the country had had the same problem.

The prime sponsor also points out that even if the WAP were held not to be a "project" within the meaning of #94.4(000), this was a mere technicality or misnomer and Milwaukee County actually fulfilled its obligation to DOL with respect to the allocation of CETA funds between "sustaining activities" and "projects." The County allocated over 4.4 million dollars more than was required by DOL for project purposes, even if the total amount of funds approved for the WAP (1.9 million dollars) is not counted as project money. In view of these circumstances, I agree with the Prime Sponsor and Grant Officer (contrary to the Complainants' wishes) that no sanction or remedy is required for this violation of the regulations and I affirm the Grant Officer's determination on the "project" requirements issue.

Complaint on labelling WAP participants handicapped and putting them in sheltered employment[17]

13. CETA participants enrolled in WAP are labelled as handicapped and placed illegally in sheltered employment.

For many years a primary function of JVS was working with the handicapped. Beginning in 1977, many CETA workers in the WAP were placed with JVS handicapped workers and in sheltered workshops. The Grant Officer found that placement of CETA work experience participants in sheltered workshops at minimum wage did not violate the CETA Act, regulations or grant, or the DOL regulations on employment of handicapped clients in sheltered workshops at 29 C.F.R. 525. Nevertheless, the Grant Officer expressed his view that sheltered employment is not an appropriate work experience under CETA, because it does not teach marketable skills, it may stigmatize participants, and does not further the goal of self-sufficiency through placement in unsubsidized employment.

As the Grant Officer pointed out (see ALJ Exhibit 38) the Wisconsin statutes, until they changed in 1979, provided a broad definition of the term "handicapped."

> "Handicapped person means any person who by reason of a physical or mental defect, or infirmity, whether congenital or acquired by accident, injury or disease, or any non-disabled person who, by reason of economic, educational, experimental, socio-cultural, or other deficiency or inadequacy, is, or may be expected to be, totally or partially incapable for remunerative

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[17]A similar issue was contained in the Complainant's letter of February 20, 1978.

> occupation; or who may reasonably be expected to be fit to engage in a remunerative occupation after receiving vocational rehabilitation services." (Wisconsin Statutes of 1975 Section 47.40(3)(a))

The CETA regulations at 20 C.F.R. 675.4 which became effective April 1, 1979 provided a definition of "handicapped" as follows:

> "Handicapped individual means any person who has a physical or mental disability which constitutes a substantial barrier to employment, and can benefit from CETA services provided, as determined by the prime sponsor."

Prior to that 29 C.F.R. 98.21(h) provided:

> "The term 'handicapped individual' means any individual who (1) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment, and (2) can reasonably be expected to benefit in terms of employability from an activity under the Act."

Thus, under the Wisconsin statutory definition, which was used by JVS, a great many persons could conceivably be classified as handicapped and eligible for sheltered employment.

The evidence at the hearing indicated that, for the reasons cited above by the Grant Officer, sheltered employment as carried out in the early phases of the WAP was not an appropriate CETA activity. The main instance where the term "handicapped" was associated with CETA was the subgrant entitled "Handicapped Serving the Handicapped" which began on July 1, 1977 and was re-

placed by new Title II and VI subgrants in March and April, 1978. All parties now agree that use of that particular title was unfortunate. On the other hand, the limited proposal originally envisaged was well within the scope of CETA, which encourages participation of handicapped individuals, as defined in 29 CFR 98.21(h).

A potential conflict between the WAP and the goals of CETA arose when the original Handicapped Serving the Handicapped proposal was put in operation so as to place a large portion of the County's General Assistance population in sheltered employment. Work experience positions available at JVS included production training (industrial subcontract assembly work), food service, maintenance, Project Clean (domestic work), print shop, and typewriter repair. Most of these programs were intended to teach more work habits and work attitudes rather than specific skills. Witnesses differed in their assessments of what proportion of the General Assistance population needed this sort of work experience. Betty Bender, a JVS counselor in food service, testified that a number of her counselees were ready for competitive employment when they first came to her, but they were nonetheless placed in sheltered employment. Patricia Gahl, a JVS counselor and Job Search supervisor there, testified that the average WAP participant was a high school dropout with a sixth to eighth grade reading level. They all had one thing in common-they needed jobs.

The WAP may properly be criticized from a programmatic standpoint for failing to adequately distinguish the individual needs of this diverse population and failing to provide more appropriate employment and training services accordingly. However, the Complainants have not tied

their very general allegations to specific statutory or regulatory violations, no specific remedy has been requested and the Complainants have the burden of proof as to both violation and remedy. I certainly agree with the Grant Officer that sheltered employment for CETA participants as it was operated by Milwaukee county in the WAP was inappropriate and I affirm his final determination on that issue.

Complaint on Discrimination for Marital Status

28. The Work Assistance Program has discriminated against participants on the basis of marital status.

The Grant Officer found that this complaint refers specifically to a married couple, Joseph and Sandi Buti, who were denied access to JVS because of their marital status. It was the policy of the Welfare Department to refer only single individuals to JVS. Both Mr. and Mrs. Buti were referred to JVS, whereupon JVS refused to enroll either one. While the Butis were trying to obtain a grievance hearing, the Grant Officer learned from Kenneth Ramminger, Deputy Director of the Welfare Department, that from May 1978 on, the Welfare Department had been referring both husbands and wives for enrollment in CETA. Meanwhile, the Butis moved to Illinois, so they were no longer eligible for the services of Milwaukee County CETA. The Grant Officer determined that since the policy complained of had been changed and the specific complainants affected by it were no longer eligible, a hearing would serve no useful purpose. This issue was not raised at the hearing before me, but it is referred to in the Complainant's brief. I affirm the Grant Officer on this point.

Complaint on the WAP Hiring a Public Relations Firm

32. The Work Assistance Program has hired a public relations firm with $5,000.00 of CETA funds to counteract media publicity about the program.

The Grant Officer found a $6,000.00 line item budgeted in the Title I subgrant with JVS for public relations, but that no costs had been billed to the prime sponsor for this item. The Grant Officer found no violation of the Act, regulations or grant. No evidence was introduced on this issue at the hearing. I affirm.

Complaint on Violation of the Davis-Bacon Act

47. The Work Assistance Program does not comply with Davis-Bacon Act provisions.

The Grant Officer found that this complaint dealt specifically with four PSE participants employed as security guards at Sacred Heart Rehabilitation Hospital, where some Davis-Bacon related construction was in progress. The guards were being paid the prevailing rate for security guards at the hospital. Since the guards were not performing any construction work, the Grant Officer determined that they were not covered by the Davis-Bacon Act wage provisions and he found no violation of the Act, regulations or grant.[18]

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[18]29 C.F.R. 96.34 provided in part:

"Compensation for participants

(a) Minimum wage for participants. Each participant shall be paid at a rate no less than the highest of the following: . . .

(5) The prevailing rate established by the Secretary, in accordance with the Davis-Bacon Act, as amended, for participants involved in employment covered by the Davis-Bacon Act as specified in § 98.29 of this title . . ."

At the hearing before me, a considerable amount of new evidence was introduced on this subject, indicating that CETA participants had been engaged in work rehabilitating and renovating housing properties in which Federal funding other than CETA was involved. In these cases it appeared that the other funding source was the U.S. Department of Housing and Urban Development, but the record does not reflect under what statute or statutes the funding was provided, nor does the record establish the CETA titles, number or identity of the WAP participants who may have been entitled to prevailing construction wages under the Davis-Bacon Act rather than the minimum wage they were actually paid. Under the CETA regulations, it is necessary to identify the applicable funding statute to determine whether Davis-Bacon wages are required to be paid under any circumstances. 29 C.F.R. 98.29. It is then necessary to identify the CETA title of the participants employed in covered construction activity, since Davis-Bacon wages were not necessarily required for Title III YEPT and YCCIP participants. It is also necessary to determine whether CETA participants were doing the same work as other employees paid Davis-Bacon wages, so that the CETA workers might be entitled to the same wages for that reason.

I find that the record contains sufficient evidence of a regulatory violation to warrant further inquiry. Therefore, the Grant Officer's final determination pertaining to the Davis-Bacon wage complaint is modified to require the prime sponsor, in its review of the participants' wages and benefits, to inquire into the matters pertaining to Davis-Bacon wages as set forth above, and to submit the results to Region V DOL within 60 days of the date of this decision,

treating this matter thereafter the same as I have ordered in the case of the complaints on wages and benefits herein.

Complaints on Threats, Intimidation, etc., Concerning the WAP

57. The prime sponsor's agents have threatened, intimidated, and coerced local agencies and organizations into cooperating with the Work Assistance Program.

The Grant Officer found no specific evidence of threats, intimidation or coercion of local agencies, however he did find that some community-based organizations believed they had lost CETA positions due to the expansion of the WAP and that plans were made in FY 1978 to fill a percentage of CETA positions in private, non-profit agencies with general assistance recipients. The Grant Officer asked for information from Milwaukee County pertaining to its choice of service delivery agents and when this was not forthcoming he found the County in violation of the CETA regulations[19] and directed the County to immediately develop a competitive bidding process for the delivery of work experience services in compliance with the April 3, 1979 regulations and 29 C.F.R. Part 70. The results of the bidding process, including the names of the service deliverers chosen and the signed contracts, were to be submitted to the Region V DOL office for approval.

At the hearing there was insufficient evidence to prove any retaliation, threats, intimidation or coercion against

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[19]29 C.F.R. 95.14(b)(3)(i)(B) of the 1977 regulations and 20 C.F.R. 676.10-4(d) and 676.23 of the April 3, 1979 regulations. These have to do with steps to be taken by prime sponsors in selecting service deliverers and what criteria to use in determining the selection.

any local agencies as prohibited by 29 C.F.R. 98.45(b). This subject was explored in considerable detail in *Worker Rights Institute v. Milwaukee County*, Case No. 79-CETA-288 (May 26, 1981) in which on somewhat different evidence the prime sponsor's actions were held not to constitute a violation of the Act or regulations. The prime sponsor is authorized to decide what programs to fund and it chose to give priority to the WAP. On the other hand, I agree with the Grant Officer that the selection of service deliverers should be made in accordance with the regulations and I affirm his order on this issue to develop a competitive bidding process and submit the results to the regional office for approval.

Complaints on Monitoring the WAP

53. The prime sponsor has made no effort to bring the Work Assistance Program into compliance with federal regulations.

54. The prime sponsor's CETA office has made no effort to bring the Work Assistance Program into compliance with federal regulations.

These complaints relate specifically to a lack of monitoring of subgrantees by the prime sponsor. The Grant Officer found that the prime sponsor had violated 29 C.F.R. 98.31 by failing to monitor the WAP, at least during the first year of its operation. In his final determination he found that, as of November 1979, the County still had not implemented a specific comprehensive monitoring program for the WAP, in violation of 20 C.F.R. 676.75-2 of the 1979 regulations. He directed the County to submit to the regional office a plan for "on-going, comprehensive monitoring of WAP."

The Grant Officer's determination was appealed, not by the prime sponsor or the Workfare Coalition, but by Complainant John Kropp. The Complainants introduced almost no evidence on the monitoring issue at the hearing. The DOL Federal Representative, Ms. Humphrey, testified that during her FY 1980 performance assessment of Milwaukee County's CETA program the independent monitoring unit was still not in full compliance with the 1979 regulations, nor were subgrantees monitoring themselves, another requirement of those regulations. At the time of her testimony, the County was in the process of taking the required corrective action, and had submitted a comprehensive monitoring plan. I find that no further action is required on this issue at this time.[20]

Complaint on Funding of the Welfare Advocacy Center

CETA positions at the Welfare Advocacy Center (WAC) were improperly funded.

The Grant Officer found that the WAC had submitted a proposal to the Milwaukee County CETA office for eight

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[20]A similar issue on monitoring of the WAP was presented in *Worker Rights Institute* v. *Milwaukee County, supra.* Based on the more extensive evidence on that point presented at that hearing it was held:

> "Thus, while it could be said that a technical violation of the regulation (29 C.F.R. 98.31) has existed from time to time because monitoring should have been more extensive, it appears that the Grant Officer and Region V of the Department of Labor have taken proper corrective action. I find that there has been substantial compliance with the Act and regulations with monitoring and that no sanctions or punitive actions against the Prime Sponsor or anyone connected with the Prime Sponsor are warranted at this time for not having had more extensive monitoring of CETA programs in Milwaukee County in FY 1978 and 1979."

CETA PSE positions about 1978. Although there was an indication that the County Executive had vetoed that proposal, it appeared that an agreement was reached with the late Jean Schrader, who was then Director of WAC, that six PSE positions would be placed at WAC through the JVS subgrant. The number of positions had been reduced from eight to six to assure adequate funds for fringe benefits (health insurance) for the participants. The Grant Officer found no violations of the Act, regulations or grant. I affirm.

Complaints on Discrimination

7. Participants in the CETA VI portion of the Work Assistance Program were denied opportunities to move into supervisory positions of the CETA III portion of the Work Assistance Program solely on the basis of age.

26. The Work Assistance Program has discriminated against participants on the basis of age.

27. The Work Assistance Program has terminated participants solely on the basis of age.

29. The Work Assistance Program has discriminated against participants on the basis of handicap. Disabled or handicapped individuals are not allowed in the program.

The Grant Officer found no evidence of discrimination on the basis of age. He did not issue a separate determination on Complaint number 29, above.

Almost no evidence was introduced on these issues at the hearing. Cherae Rose testified that she was transferred from Title VI to a youth program about the time she had her twenty-first birthday, in April of 1978, whereupon she was told that because she was over 21 she was no longer

eligible for the youth program due to her age. She then apparently made no effort to re-enroll in Title VI. Instead she found unsubsidized employment on her own initiative, and thus, being employed, she was no longer eligible for CETA, rendering the issue moot in her case. The record contains no evidence of a pattern or practice of age discrimination in the WAP.

Similarly, there is insufficient evidence of discrimination against any disabled or handicapped persons. I affirm the Grant Officer's finding that there has been no violations of the Act, regulations or grant involving improper discrimination against CETA participants.

Complaints on Maintenance of Effort

22. The Work Assistance Program transferred participants into the Work Assistance Program and cut the number of hours they were allowed to work, thereby lowering their take-home wages.

48. The Work Assistance Program has impaired existing contracts and has resulted in the substitution of funds.

49. The Work Assistance Program has been used to replace regular employees.

50. The Work Assistance Program has substituted federal funds for local funds to maintain the same workload.

51. The Work Assistance Program has resulted in the substitution of federal funds for $800,000.00 in County general assistance funds.

The following additional complaints had been made by AFSCME District Council 48 and have been appealed by Complainant John H. Kropp.

CETA funds were not used to increase employment opportunities over those opportunities which would otherwise have been available.

CETA funds were used to supplant non-federal sources for the purpose of planning and administering the program.

CETA funds were used to displace County tax level funded County employees.

The County reduced its customary level of service to the general assistance target population by transferring the PFWP to a non-profit organization.[21]

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[21]The following are excerpts from the 1973 Act pertaining to maintenance of effort:

§ 703. *Conditions applicable to all programs*

The Secretary shall not provide financial assistance for any program under this chapter unless—

. . .

(7) the program will not result in the displacement of employed workers or impair existing contracts for services or result in the substitution of Federal for other funds in connection with work that would otherwise be performed;

. . .

(11) funds will be used to supplement, to the extent practicable, the level of funds that would otherwise be made available from non-Federal sources for the purpose of planning and administration of programs within the scope of this chapter and not to supplant such other funds;

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Section 602(c) incorporates by reference and applies to Title VI programs the following Title II provisions:

§ 205. *Applications for financial assistance*

(c) An application for financial assistance for a public service employment program under this subchapter shall include provisions setting forth—

. . .

(8) assurances that no funds received under this subchapter will be used to hire any person to fill a job opening created by the action of an employer in laying off or terminating the employment of any regular employee not supported under this subchapter in anticipation of filling the vacancy so created by hiring an employee to be supported under this subchapter;

. . .

(25) assurances that jobs funded under this subchapter are in addition to those that would be funded by the sponsor in the absence of assistance under this chapter;

§ 208. *Special conditions*

(a) The Secretary shall not provide financial assistance for any program or activity under this subchapter unless he determines, in accordance with such regulations as he shall prescribe, that—

(1) the program (A) will result in an increase in employment opportunities over those opportunities which would otherwise be available, (B) will not result in the displacement of currently employed workers (including partial displacement such as a reduction in the hours of non-overtime work or wages or employment benefits, (C) will not impair existing contracts for services or result in the substitution of Federal for other funds in connection with work that would otherwise be performed, and (D) will not substitute public service jobs for existing federally assisted jobs;

Title VI also includes the following provision:

§ 605(b). No funds for public service employment programs under this Act may be used to provide public services, through a private or nonprofit organization or institution, which are customarily provided by a State, a political subdivision, or a local educational agency in the area served by the project.

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The corresponding provisions for Title III are as follows:

SEC. 353. (a) The Secretary shall provide financial assistance under this part only if he determines that the activities to be assisted meet the requirements of this section. (b) The Secretary shall determine that the activities assisted under this part—

(1) will result in an increase in employment opportunities over those opportunities which would otherwise be available;

(2) will not result in the displacement of currently employed workers (including partial displacement such as reduction in the hours of non-overtime work or wages or employment benefits;

(3) will not impair existing contracts for services or result in the substitution of Federal for other funds in connection with work that would otherwise be performed;

(4) will not substitute jobs assisted under this part for existing federally assisted jobs;

(5) will not employ any youth when any other person is on layoff by the employer from the same or any substantially equivalent job in the same area; and

(6) will not be used to employ any person to fill a job opening created by the act of an employer in laying off or terminating employment of any regular employee, or otherwise reducing the regular work force not supported under this part, in anticipation of filling the vacancy so created by hiring a youth to be supported under this part.

Pertinent regulations pertaining to maintenance of effort are: 29 C.F.R. 97.719, 29 C.F.R. 97.334, 29 C.F.R. 99.24, and 29 C.F.R. 96.34.

29 C.F.R. 99.34 provides in part:

(a) Publis service jobs funded under Title VI of the Act shall only be in addition to employment which would otherwise be financed by the prime sponsor without assistance under the Act (sec. 602(c), 205(c)(25).

(b) To assure maintenance of effort, the prime sponsor shall see that all programs under Title VI of the Act:

(1) Shall result in an increase in employment opportunities over those which would otherwise be available;

(Continued on following page)

The Grant Officer found that eight former employees on the County's Pay for Work Program staff were adversely affected when that program was replaced by the WAP, in violation of sections 602(c), 208(a) (1) (B), 353 (b) (2) and 703(7) of the Act, which prohibit the use of CETA funds to displace currently employed workers (including partial displacement, such as a reduction in the hours of nonovertime work or wages or employment benefits). It was determined that David Duffey, Bernie Klees, Joseph Weisenberger and Chester Cholka had suffered reductions in current salary and salary range; John Kropp and Roman Kaleta were placed in lower salary ranges with no loss in current pay and Lori Baker and Cheryl Tucker were laid off and not placed in equivalent positions. Ms.

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(2) Shall not result in the displacement of currently employed workers, including partial displacement such as a reduction in hours of nonovertime work, wages, or employment benefits;

(3) Shall not impair existing contracts for services or result in the substitution of Federal funds for other funds in connection with work that would otherwise be performed; and

(4) Shall not substitute public service jobs for existing federally assisted jobs under federally supported programs other than those under the Act (secs. 602(c), 208(a)(1).

(c) Prime sponsors, program agents and subgrantees may not terminate, layoff, or reduce the working hours of, an employee in anticipation of hiring an individual with funds available under Title VI. In addition, no partcipant shall be used to fill positions or provide services normally provided by temporary, parttime, or seasonal workers or contracted out, or to fill full-time vacancies, unless documentation is maintained, as provided in paragraph (h) of this section, that such action does not constitute a substitution of Federal funds for purposes that would otherwise have been supported by other resources . . . ."

Baker was subsequently reemployed by the County. The following corrective action was required by the Grant Officer:

> (1) Messrs. Duffey, Klees, Weisenberger and Cholka must be restored to the same salary and salary range as when employed on PFWP. Messrs. Duffey, Klees, Weisenberger and Cholka must also be paid back wages from non-CETA funds in the amount of the difference between their former and current salary levels for the period they were paid at the lower rate.
>
> (2) Messrs. Kropp and Kaleta must be restored to the same salary range as when employed by PFWP.
>
> (3) Ms. Cheryl Tucker, if still on involuntary lay-off, must be offered a position equivalent to her PFWP position and she must be paid back wages from non-CETA funds for the period she was on involuntary lay-off status.
>
> (4) Ms. Lori Baker must be paid back wages from non-CETA funds for the period that she was on involuntary lay-off from County employment.

The Grant Officer found no maintenance of effort violation with respect to the overall replacement of the County-funded Pay for Work Program by the CETA funded Work Assistance Program, both of which provided work experience, generally minimum wage positions for General Assistance eligibles. The Grant Officer approached the maintenance of effort complaints by dividing them analytically into three questions, which will be discussed in turn:

> (1) Were CETA funds used to increase employment opportunities over those opportunities which would otherwise have been available?

To answer this question, the Grant Officer compared expenditures and slot levels in the PFWP and WAP as follows:

The County reported that its expenditures for the PFWP since 1975 were:

YEAR	EXPENDITURE
1975	$2,335,996
1976	$3,014,580
1977	$2,097,428
1978	$ 333,277

The County also reported that it had budgeted the following amounts for the JVS WAP for 1978:

$1,200,000	County tax revenue
$1,200,000	State Title XX matching funds
$ 600,000	Federal Title XX funds
$3,000,000	

Of that budgeted amount, $2,999,210 was reported by the County to have been spent. Thus, total non-federal funds provided by the County to JVS are calculated as follows:

$2,999,210	Expenditures reported
$ 600,000	Deduction of Federal Title XX
$2,399,210	Subtotal
$ 333,277	1978 expenditure for PFWP
$2,732,487	Total County and State Expenditures in 1978

The Grant Officer further found that the maximum number of PFWF slots filled was 682, while the WAP provided 1,220 work experience positions in 1978, the year the PFWP expired. As a result, since the amount of non-federal funding for employment and training of General Assistance eligibles in 1978 exceeded the amount spent for the same purpose on the PFWP in 1977, and since the number of employment opportunities had increased with the advent of CETA funding, the Grant Officer concluded

that the County had maintained its level of financial effort with respect to employment and training of the General Assistance target population, and thus did not violate sections 602(c), 205(c)(25), 208(a)(1)(A), and 353(b)(1) of the 1973 Act and the implementing regulations at 29 C.F.R. sections 96.24(a), 96.24(b)(1), 99.34(a) and 99.34(b)(1).

(2) Did CETA funds supplant non-federal sources of funding for planning and administering the program?

The Grant Officer found no violation of section 703 (11) because the level of non-federal funding had increased as shown by the above figures.

(3) Did the County reduce its customary level of service to the General Assistance population by transferring the PFWP to a non-profit organization?

This question arose under Section 605(b) of the Act and 29 C.F.R. 99.34(i), which prohibit use of CETA monies to provide public services through a non-profit organization which are customarily provided by a state or a political subdivision if such funding will result in a reduction of the customary level of such services by the governmental entity. The Grant Officer viewed the providing of work experience for General Assistance eligibles as a public service within the meaning of these provisions, but found no violation, because the customary level of non-federal funding had not been reduced.

At the hearing, with respect to the eight displaced County employees, the evidence showed that a portion of the corrective action ordered by the Grant Officer had already been taken. Respondents' Ex. MM shows the amounts of back pay issued by the County to Messrs. Duf-

fey, Weisenberger, Cholka, Klees and Kaleta.[22] In addition, the same five employees, plus Mr. Kropp, were reinstated by the County in the same pay ranges which they had occupied on the Pay for Work staff. These actions fulfill the corrective action required by the Grant Officer with respect to these six employees.

The Complainants have contested this corrective action in three respects. First, they point out that the back pay checks did not include any interest. The Grant Officer did not include this in his final determination, however current ETA policy, as set forth in Field Memorandum No. 188-80 (March 14, 1980) provides for interest on back pay awards and case precedents do likewise. *Peters v. Milwaukee County*, 79-CETA-198 (March 24, 1981) aff'd 682 F.2d 609 (7th Cir. 1982). Accordingly I order that interest at 6 percent per annum be paid to these former PFWP employees in this instance.

Second, the Complainants challenged the relief provided to David Duffey on the grounds that it should be based on a higher pay range. Mr. Duffey had been classified as a Vocational Counselor Supervisor at pay range 22, step 5. Following Kenneth Deal's departure as Director of the PFWP, Mr. Duffey was given a temporary assignment as Acting Director from August 8, 1977 until September 8, 1978. In that assignment he was paid at step 1 of pay range 28, which is the same as step 4 of pay range 25. When he left the PFWP he was placed in a position in step 5 of pay range 21. His back pay was calculated based on what he would have earned in pay range

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[22]These amounts are: Duffey $5,236; Weisenberger $1,475; Cholka $627; Klees $1,475; Kaleta $581.

25, step 5; that is, as if he had remained as Acting Director and received an additional step increase. As prospective relief, however, the County reassigned him to pay range 22, his old pay range as Vocational Counselor Supervisor. As explained by James Eggers, Classification and Wage Administrator in the County Department of Personnel, under the County civil service system, an employee in a temporary assignment to a higher classification is paid at the higher level only for those hours actually worked at that level. Vacation, sick leave and personal time are compensated at the employee's original classification level, to which he returns upon completion of the temporary assignment. In other words, under the applicable civil service rules, Mr. Duffey had no vested right or legitimate expectation of continued employment as PFWP Director. Since his temporary assignment could have terminated because of the selection of a new Director or another reorganization, rather than because of the program's phase-out, it is speculative to assume that but for the phase-out he would have remained indefinitely as PFWP Acting Director. Under these circumstances, I find that the actions taken by the County are sufficient to remedy harms directly attributable to the maintenance of effort violation found by the Grant Officer in Mr. Duffey's case.

Third, the Complainants raised the situation of Chester Cholka, who received back pay and a reassignment to his previous pay range, but was subsequently transferred to a lower paying job by the County. As a result of the final determination, Mr. Cholka's position had been reclassified from Maintenance Worker in pay range 12 to Maintenance Worker (DOL) in pay range 13. In 1981,

for budgetary reasons, the County Board of Supervisors abolished about 25 positions in the Department of Social Services (DSS) as well as positions elsewhere in the County government. Among the positions abolished were two maintenance worker positions at DSS, one of which was Mr. Cholka's position as Maintenance Worker (DOL). As a result, Mr. Cholka was given a choice of accepting a maintenance worker position elsewhere in the County at the regular pay range 12, the highest standard pay range for such positions, or being laid off. He chose to accept the pay range 12 position. However, he was not aware until he received his first check that the new position was at a lower rate of pay. The record contains no evidence of a retaliatory motive for Mr. Cholka's downgrade and the County Board's decision to abolish certain positions has no nexus with CETA. It is undisputed that the County took the corrective action for Mr. Cholka ordered by the Grant Officer to redress its maintenance of effort violation, and the record contains no evidence to show that the subsequent downgrade had any relationship to the earlier CETA violation. Accordingly, I find that no further action is required by the Respondents in Mr. Cholka's case, except, as noted above, for the payment of interest on back pay.

The County has appealed and, therefore, has not complied with the corrective action ordered by the Grant Officer with respect to Cheryl Tucker and Lori Baker, the two remaining PWFP employees. Ms. Tucker was laid off on May 8, 1978 due to the termination of the PFWP. At that time she was in pay range 11, step . She was offered several County positions in lower pay ranges, but instead she went on layoff and has had no communications with

the County since that time. The Grant Officer ordered that she be offered a position equivalent to her PFWP position and paid back wages from non-CETA funds for the period she was on involuntary lay-off status. It is undisputed that Ms. Tucker was laid off due to the phase-out of the County funded PFWP, which was replaced by the CETA funded WAP. Her lay-off was thus a displacement of a currently employed worker in violation of sections 602(c), 208(a)(1)(B), 353(b)(2), and 703(7) of the Act, as well as 29 C.F.R. 99.34(b)(2), a violation for which she has not been made whole. The County's requests to have Ms. Tucker's appeal dismissed for failure to prosecute is hereby denied. The Grant Officer's determination with respect to Ms. Tucker is affirmed and the prime sponsor is ordered to take affirmative steps to locate Ms. Tucker, to offer her reinstatement to a position comparable to that which she lost and to pay her back wages and interest calculated at 6 percent per annum; from non-CETA funds, however, such back wages may be offset upon proof submitted to the Grant Officer of any amounts of wages Ms. Tucker earned or General Assistance paid to her by the County following her lay-off.

Lori Baker, a vocational counselor aide in the PFWP, was laid off on May 8, 1978. The County informed her of several available positions, including Financial Assistance Worker, in which she expressed an interest. She was not offered that position, however, whereupon she filed a grievance in which she prevailed. This resulted in her reemployment by the County as a Financial Assistance Worker on March 5, 1979 and her receipt of back pay for the period October 6, 1978 through March 5, 1979. However, she has never received back pay to cover the period of time from

her lay-off on May 8, 1978 until October 6, 1978. On January 31, 1980 the County began discharge proceedings against Ms. Baker on grounds of unsatisfactory work performance as a Financial Assistance Worker by filing detailed written charges including 18 cases of over-payments, 31 cases of failure to update medical excuses from work, 19 cases of errors in food stamp grants, 8 cases of failure to arrange reimbursement from the Social Security Administration, 14 cases of erroneous eligibility decisions, and 87 overdue reviews out of a caseload of 155. Ms. Baker did not deny the truth of these charges. The record also shows that she had previously received a below average performance evaluation and a written reprimand. The Personnel Review Board upheld Ms. Baker's removal as a Financial Assistance Worker (pay range 7) and ordered that in lieu of discharge she be demoted to a position of Clerk II (pay range 5) in the County classified service. However, the County has never offered her such a position. I find that the County still owes Ms. Baker back pay for the period immediately following her lay-off from the PFWP (May 8, 1978 through October 6, 1978), a displacement caused by the CETA funded WAP, in violation of sections 602(c), 208(a)(1)(B), 353(b)(2), and 703(7) of the Act. The County is ordered to pay this back pay with interest at 6 percent per annum.

However, I do not find that Ms. Baker is now entitled to any County position because of any violation of CETA. As a result of her own grievance, Ms. Baker was placed in the position of her choice, a Financial Assistance Worker, in a pay range higher than her previous pay range in the PFWP. Except for her back pay and interest, she was at that point made whole for any injuries caused by the

County's maintenance of effort violation. Her subsequent employment difficulties have no causal nexus with CETA. Her salary was never paid out of CETA funds; she presented no evidence of retaliation due to her use of the CETA complaint system; and her discharge was amply supported by substantial and uncontested evidence. Therefore her complaints arising from her discharge and subsequent events do not state a claim covered by the Act and regulations.

Before analyzing the remaining maintenance of effort complaints, several relevant facts should be noted pertaining to the history of the Pay for Work Program and its replacement by the Work Assistance Program. As authorized by Wisconsin Statute, Chapter 49.002, Milwaukee County has had some form of work relief requirement for General Assistance recipients since the 1930's. In January 1970, the program was reorganized as the PFWP through the enactment of Chapter 50 of the County General Ordinances. PFWP participants worked 40 hours a week at minimum wage, were classified as exempt employees under the Milwaukee County civil service, and had Social Security and income taxes withheld from their pay. Both General Assistance cash grants and the PFWP were fully funded by County tax revenues. Prior to 1977, the PFWP had about 550-750 slots, too few to provide jobs for the entire eligible General Assistance population. In fact, by June 1977, the PFWP had developed a backlog of 2,000 persons who could not be placed in existing slots. In 1977, three major changes were made in the PFWP. First, the program was moved out of the County Executive's Office into the Department of Public Welfare (now the Department of Social Services). Second, the program was cut

back from 40 to 32 hours a week at $2.00 an hour. Third, the County Board increased the PFWP budget in order to expand the program to 1,200 slots, with new slots to be created outside the County government in private, non-profit worksites. This 1,200 slot target was never reached, despite efforts by the PFWP staff.

Meanwhile, planning for the new CETA funded program for General Assistance eligibles was going on during the first half of 1977 at the same time as the attempt to expand the PFWP. The Welfare Department came to the County Board and County Executive seeking an addition of at least $3 million to the General Assistance budget to cover an increased caseload,[23] and the County Executive asked the County CETA office to plan a CETA program to serve the General Assistance population, in consultation with Mr. Galazan of JVS. This was the genesis of the Learn to Earn and Handicapped Serving the Handicapped programs, which later became the Work Assistance Program.

The record leaves absolutely no doubt that the major purpose of the WAP was to save County tax levy dollars previously spent on both General Assistance and the PFWP by creating a new employment and training program for General Assistance eligibles to be supported by Federal CETA dollars. The substitution of the CETA funded WAP for the County funded PFWP did result in the substitution of Federal for other funds in connection

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[23]The budgetary shortfall was attributable to two factors: a poor economy in 1976, which created an increasing General Assistance caseload, and the fact that the County's original 1977 G. A. budget was unrealistically low, much lower, in fact, than the amount actually expended in 1976.

with work that would otherwise be performed. On the other hand, the record also indicates that the County, under the leadership of CETA Director Powers, did try to implement the new program in such a way as to avoid the many pitfalls posed by the CETA maintenance of effort requirements. Ms. Powers and Mr. McClutchy of the Corporation Counsel's office attempted to ensure that the tax levy contribution to the WAP would equal or exceed the County's support for the PFWP and that when the PFWP was phased out the PFWP staff would be placed in comparable positions without loss of pay or benefits. However, as noted above, for some unknown reason, the County failed to fully protect the PFWP staff.

There is no question that the WAP was the functional replacement for the PFWP in Milwaukee County—both provided work experience jobs for General Assistance eligibles in lieu of cash grants. This functional equivalence is sufficient to make the two programs comparable for purposes of determining possible maintenance of effort violations.

In addition to dealing with the PFWP staff, the Grant Officer analyzed the maintenance of effort issue in terms of the County's overall level of non-federal financial support for work experience jobs for General Assistance eligibles, before and after the influx of CETA funding. Because the transfer of PFWP participants to the WAP occurred in early 1978, and the PFWP went out of existence during that year, the final determination compared expenditure levels in 1977 with those of 1978, concluding that the County had maintained effort by spending more in 1978. No one has challenged the accuracy of either the

figures or the arithmetic relied upon by the Grant Officer, and his approach was consistent with the theory behind the County's contributions to the WAP in 1978 and later years. However, for the reasons set forth below, I find this approach does not cover the entire situation involved here of comparing the level of non-federal spending before and after the influx of CETA funding.

The Complainants have raised two major questions regarding the adequacy of the above analysis. The first is whether or not the County should be "given credit" for the state's Title XX matching funds as part of its contribution to the WAP in 1978. The Grant Officer counted the state money as part of the County's effort. This approach is fully supported by the language and the purpose of the CETA maintenance of effort provisions, which prohibit "the substitution of *Federal* for *other* funds in connection with work that would otherwise be performed." (emphasis supplied). Sections 703(7), 208(a) (1) (c), 353(b) (3) of the 1973 Act. Section 703(11) of the 1973 Act contains similar language, requiring that CETA funds "be used to supplement, to the extent practicable, the level of funds that would otherwise be made available from *non-Federal* sources for the purpose of planning and administration . . ." (emphasis supplied). Thus the statutory distinction is between federal and non-federal funds, and the latter category includes both state and county revenues. The purpose of the CETA maintenance of effort requirements is to prevent the substitution of federal CETA dollars for other, traditional funding sources for state and local governments. However, the statute makes no distinction as to whether the existing source of non-federal funds is state or local. Since the allocation of fiscal responsibility for

public welfare as between states and their political subdivisions is not a federal question, but a matter to be decided by each state legislature, the mix of county and state monies through which Milwaukee County maintained its effort to provide work experience to its General Assistance population is of no consequence in resolving this alleged CETA violation.

The second challenge to the Grant Officer's approach is that the Grant Officer, in comparing 1977 and 1978 expenditures, failed to consider the fact that CETA funding had begun in mid 1977, rather than the beginning of 1978. It is true that CETA work experience funding for the General Assistance population began in July 1977 under the Handicapped Serving the Handicapped program, beginning with the PFWP backlog. Thus, 1977 was a transitional year in which both the PFWP and the precursors of the WAP operated simultaneously. On the other hand, active PFWP participants were not transferred to the WAP until January through March of 1978, and the last PFWP staff members were finally transferred in September 1978. It is therefore possible to view 1977 as a period in which CETA funding merely supplemented the existing PFWP, while the actual substitution of CETA funded WAP for County funded PFWP positions did not occur until the transfers were made in early 1978. A comparison of 1977 and 1978 non-federal funding could then be focused on a single measurable event, the transfer of the PFWP participants to the WAP.

However, I believe that this approach does not provide the whole story, it overlooks the fact that if 1976 is used as the base year for comparison, since it was the most recent year in which no CETA money was expended

on the General Assistance program, and the 1976 expenditures are compared with 1977 and 1978, the County failed to maintain effort in those years, as follows:

Year	Non-Federal Expenditures	Shortfall
1976	$3,014,580	.....
1977	$2,097,428	$ 917,152
1978	$2,732,487	$ 282,093
	Total:	$1,199,245

The years 1979 and 1980 appear to present no problem here because the non-federal contribution of between 4 and 5 million dollars exceeded the County's expenditures in 1976. In my opinion, the Complainant's contention has merit, and I find that a maintenance of effort violation did occur here in violation of 29 CFR 99.34, among other provisions, and that the proper remedy is to disallow costs in the amount of the shortfall of $1,199,245.

Another maintenance of effort issue raised by the Complainants, which the Grant Officer did not comment upon, concerned the reduction in hours and wages suffered by PFWP participants transferred into the WAP. The Act prohibits use of CETA funds to displace currently employed workers (including partial displacement such as a reduction in the hours of non-overtime work or wages or employment benefits). Sections 208(a) (1) (B) and 353 (b) (2). To establish a violation of those sections the Complainants had to show a loss in the total package of hours, wages, and benefits of the transferees. The evidence shows that the wage and benefit packages in the PFWP and WAP were roughly equivalent. PFWP participants worked 32 hours a week at $2.00 an hour, which adds up to $64.00 a week. WAP participants worked 22 hours a week for $2.65

an hour, or $58.30 a week and received a bus pass worth $5.00 for a total of $63.30, or $.70 less a week than they had received in the PFWP. This is not a material difference.

An additional point raised by the Complainants at the hearing is the charge that the shift from the PFWP to the WAP impaired existing contracts for services, in violation of Sections 703(7), 208(a) (1) (c), and 353(b) (3) of the 1973 Act. In this connection it may be noted that Mr. Cholka testified that he and another supervisor completed all the County handicraft project's work orders left over from the PFWP, so those contracts were not impaired. Also, there is no specific evidence that the relationships between the PFWP and the County worksites were contractual in nature, and the record indicates that some former PFWP participants were removed from those worksites because the union objected to their continuing presence on maintenance of effort grounds. Finally, in the case of non-County worksites, such as the Veterans Administration Hospital, the evidence showed that JVS took over the PFWP's role in providing participants, so that services were not impaired.

The evidence indicates that there was probably another violation of the maintenance of effort provisions in the displacement of County homemakers. Mr. Zielinskski, President of AFSCME Local 594 in 1977, testified that in 1977 the County laid off several "homemakers" who had previously provided homemaking services to the General Assistance population. At the same time as the layoffs, the County awarded JVS a $50,000 Title XX contract to provide the same services. Mr. Brown, current Local 594 President, confirmed that the union lost homemaking positions in the County Department of Public Welfare in 1977

and/or 1978. Mr. Dolberg, Director of the Skill Training and Clinical Services Division at JVS, testified that he had managerial responsibility for the JVS Project Clean program, which provided cleaning services for the elderly. He also testified that CETA funded WAP participants have worked in Project Clean, at least in 1978 and 1980. It seems probable that the services provided by CETA funded WAP participants in Project Clean were substantially equivalent to those previously provided by County homemakers whose positions were abolished at the time the services were contracted out to JVS, and, if so, the County appears to have violated to some extent 29 CFR 99.34(b) (2), (b) (4), (d) and/or (:) or paralled requirements under other titles of CETA. However, the record at present is not sufficient to establish the specific extent of this violation. Costs for CETA wages of participants who did the same work previously performed by County homemakers will be disallowed in an amount to be determined by the Grant Officer's further investigation of this matter within 90 days from the date of this decision and the prime sponsor will be required to reimburse the Department of Labor for those disallowed costs within 30 days thereafter.

I find that there is insufficient evidence to establish the Complainant's allegations that County Financial Assistance Workers were improperly displaced by CETA funded personnel.

The Complainants argued in their briefs that the County's reduction in the wages and hours of PFWP participants effective January 1, 1977 was planned in order to avoid a CETA maintenance of effort violation when the PFWP participants were transferred into CETA over a year later (from January to March, 1978). They argue

that this reduction violated 29 CFR 99.34(c) which provides that:

> "Prime sponsors, program agents and subgrantees may not terminate, layoff, or reduce the working hours of, an employee in anticipation of hiring an individual with funds available under Title VI . . ."

I find that there is insufficient evidence of the specific intent required for a violation, since the reduction must be "in anticipation of" CETA funding. It seems much more likely that the reason for the reduction was the one provided by PFWP Director, Kenneth Deal, that the County discovered that it was not required to pay minimum wages under the then recent Supreme Court decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976).

The Complainants contend that, by eliminating the direct providing of work experience jobs to General Assistance recipients through the PFWP, and contracting out the providing of such jobs to the WAP consortium with CETA funds, the County violated 29 CFR 99.34(i).[24] Assuming that providing work experience jobs is viewed as a "service", a violation would occur if the "customary level of such service" by the County was reduced. It is immaterial in this regard whether the jobs involved were provided at County or non-County worksites, since both types of worksites existed in Milwaukee County before and after

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[24]29 CFR 99.34(i) provides:

"Funds shall not be used to provide public services, through a private or non-profit organization or institution, which are customarily provided by a State, a political subdivision, or a local educational agency in the area if such funding will result in a reduction of the customary level of such service by the State, political subdivision, or local educational agency."

the CETA funding. Instead, it is the level of financial support upon which the existence of a violation turns, not only where the jobs were located. Thus this issue is really subsumed in the larger maintenance of effort issue of the level of expenditures before and after the CETA funding began. As noted above, I did find a violation here and disallowed costs in the amount of $1,199,245.

The Complainants also contend that private sector, unionized employees of several Milwaukee area firms were displaced when work they had previously done in-house was contracted out to WAP consortium members and performed by CETA participants. According to 29 CFR 99.34(b)(2):

> "To assure maintenance of effort, the prime sponsor shall see that all programs under Title VI of the Act . . . shall not result in the displacement of currently employed workers . . ."

I believe that private sector employees are protected by this because this provision of the regulation is not limited to employees of the same employer, as in section 98.24(b), but refers generally to "currently employed workers", and other subsections of the maintenance of effort regulations, such as 29 CFR 99.34(b)(3),(c), (h) and (i), clearly extend to indirect as well as direct displacement of existing employees. Also, it is the purpose of CETA to provide job training and employment opportunities for economically disadvantaged, unemployed and underemployed persons in order to assist their transition into the unsubsidized labor market. However, if persons already employed in the unsubsidized labor market lose their jobs to CETA subsidized workers, this purpose is not achieved, but is seriously undermined. An unsubsidized job is replaced

by a CETA subsidized position and the incumbent of the unsubsidized job becomes unemployed. This effect is what the maintenance of effort provisions were designed to prevent. Therefore, it doesn't matter if the currently employed workers are displaced directly or indirectly, or who their employer is, if a casual link can be proven to show that they were displaced by CETA participants. However, the burden is on the Complainants to identify specific private sector employees who were doing a particular task until it was contracted out to CETA participants, which resulted in the immediate layoff of the private employees.

At the hearing the Complainants produced evidence regarding loss of work at 4 private firms: E.R. Wagner, General Electric, Allen-Bradley, and Ben Turick. I find that the evidence pertaining to the last 3 of those firms is insufficient to prove a maintenance of effort violation. As for the E. R. Wagner firm, however, Mr. Glaser of the United Steelworkers of America testified about work formerly performed by union members at E. R. Wagner, which was subcontracted to Goodwill sometime in 1978. Complainant's Exhibit 47, a Goodwill contract with E. R. Wagner, described the job in question, riveting a freezer hinge, which was previously done at E. R. Wagner. Mr. Glaser also testified that employees were on layoff at E. R. Wagner. Mr. Wagner, President of the company, confirmed that this job had been subcontracted to Goodwill, and Maxine Gant testified that she and other CETA participants performed the subcontracted work. However, the record does not reveal how many CETA participants worked on the job or to what extent employees at E. R. Wagner were directly displaced because of the subcontracting. Apparently there is a violation here of 29 C.F.R. 99.34(b)(2) to some extent. Costs for CETA wages of participants who

displaced the E. R. Wagner employees will be disallowed in an amount to be determined by the Grant Officer's further investigation of this matter within 90 days from the date of this decision and the prime sponsor will be required to reimburse the Department of Labor for those disallowed costs within 30 days thereafter.

Complaints on Testing

14. Psychometric/psychological testing is done on all participants without informed consent.

15. Intelligence testing is done on all participants without informed consent.

16. Intelligence, psychological, vocational, and other testing is done on all participants without explanation and without explaining how the tests will be used, what they mean, who will see them, and why they are being given.

17. Participants are told they must make the tests or be terminated from the program.

18. Testing is done by untrained personnel, such as classroom teachers.

19. Tests are evaluated and assessments are made by unqualified personnel.

The Act and regulations are silent on the question of testing; it is therefore impossible to find that either has been violated.[25] The Grant Officer reviewed in some detail the tests used by JVS and how they were administered,

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[25]In this connection, for a case in which the subject of psychological testing in Milwaukee County was discussed in considerable detail and held not to apply to the CETA Act and regulations, see *Castle et al v. University of Wisconsin-Milwaukee CETA Review Project*, 80-CETA-9 (November 10, 1982).

and stated that mass testing of CETA participants ceased in July 1979. He concluded that no violation of the Act, regulations, or grant had occurred. (ALJ Exhibit 38)

As the prime sponsor's brief pointed out, the 1979 regulations cited by the Complainants, 20 C.F.R. 676.52(e)(3) and 676.53(c)(1), which speak of requirements pertaining to tests under CETA, apply to testing done as a means of selecting participants. Testing in the WAP was not done for the purpose of selection; participants were already in the program when they were tested, thus these regulations do not apply in this case.

The evidence established that mass testing was eliminated in the WAP in July 1979. Ms. Gahl, Director of JVS' Job Club, testified that at the time of the hearing only 5 or 7 percent of WAP participants had some sort of testing and that was at their request. The Complainants have demonstrated no concrete harm to participants as a result of the earlier testing, and no evidence that tests adversely affected assignments to specific employment and training activities or actual job placements. Accordingly, the Grant Officer's determination on testing complaints is affirmed.

The following are new complaints contained in Ms. Griswold's letter to the Chief Administrative Law Judge, DOL, dated December 11, 1979.

Complaints made without Exhaustion of Administrative Remedies

9. The deliberate misappropriation of funds by the Program Operator.

10. The failure of the prime sponsor to properly monitor the fiscal management of the program.

14. The Program Operator has deliberately dismantled the grievance procedure and has refused to hold requested hearings.

15. The Program Operator denied grieving participants representation by advocates in meetings that affected the participants' program participation.

16. The Program Operator's payroll accounting system is deliberately mismanaged, resulting in needless errors and delays in participant wages and stipends.

The Grant Officer has pointed out, correctly, that the Complainants made no attempt to exhaust their administrative remedies at levels below this with respect to these complaints, as required by the Act and regulations. 29 USC 816; 20 CFR 676.81 to 676.93; *Scott v. Milwaukee County,* 79-CETA-200 (April 14, 1980). These provisions require, first, exhaustion of administrative remedies at the prime sponsor level, 29 USC 816(a); 20 CFR 676.83 to 676.85; and second, exhaustion of administrative remedies at the Grant Officer level, 29 USC 816(b); 20 CFR 676.86 to 676.88. However, to preclude the filing of new complaints and the holding of additional hearings, these issues will be considered on their merits in this decision.

Complaints on Region V's Alleged Failure to Respond

1. Former Regional Administrator Gilliland's failure to respond in any manner to previous complaints filed.

3. The failure of Grant Officer Marion Smith to respond to complaints filed by WAP employees/participants

and deliberate falsification of part of a US DOL investigative report (the initial determination) by stating that John Kropp, an affected party, was interviewed in the investigation.

5. The continuing failure of the Regional office to handle complaints in a timely manner and in accordance with DOL regulations, and its failure to ensure timely disposition by the prime sponsor.

It is obvious to me, and should be obvious to anyone who reads the voluminous transcript, exhibits and briefs in this case, why these complaints took the Grant Officer and Regional Administrator's office so long to investigate and resolve. The hearing, alone, required 8 weeks over an 8 month period, and built upon extensive previous familiarity with the matters in controversy by most of the parties. Ms. Lorman, who investigated most of the complaints in this case for the Grant Officer, was both team leader and staff investigator in a unit of 4 professionals with responsibility to investigate all complaints from approximately 100 prime sponsors in Region V. The complaints in this case were far more numerous and more complex than the typical CETA complaints received by her office, and therefore required much more time to investigate. Ms. Lorman and her staff spent 21 days in Milwaukee between May and December, 1978 and interviewed approximately 67 persons in the course of the investigation. Another factor which delayed the completion of the investigation was the fact that the Worker Rights Institute (formerly the Workfare Coalition) continued to file new complaints and inquiries while Ms. Lorman was trying to complete the original investigation. The initial complaint was filed in

February, 1978. Due to previously scheduled commitments, an on-site investigation could not be scheduled immediately. The Worker Rights Institute's 57 point complaint was filed in May, 1978. Complaints on behalf of individual participants were received from the Worker Rights Institute during the summer of 1978. Additional complaints and/or requests for information were presented by Ms. Griswold, Executive Director, WRI, frequently. Ms. Griswold also wrote letters to her Congressmen and to the Department of Labor complaining about the investigation or requesting information or documents, most of which were directed to Ms. Lorman for response. Following the issuance of the initial determination on May 29, 1979, informal resolution meetings were held by the Regional Administrator with Ms. Griswold and Ms. Powers and written submissions were reviewed. A final determination was then drafted and reviewed and issued on January 4, 1980. Under these circumstances, the length of time necessary for the Grant Officer to resolve these complaints was not unreasonable. Furthermore, the Complainants have demonstrated no prejudice resulting from the delay, which was in part attributable to the Worker Rights Institute's own conduct. Also, it should be noted that the legislative history of the 1978 CETA amendments demonstrates that the 120 day limit on complaint resolution (effective April 1, 1979) was not intended to be jurisdictional in nature. See 124 Congressional Record 8224-8225 (August 9, 1978).

As for the alleged falsification in the initial determination by stating that John Kropp was interviewed in the investigation, evidence at the hearing from Mr. Kropp, Ms. Griswold and others showed that Mr. Kropp participated

in a group interview conducted by Ms. Lorman in July, 1978. Therefore, it was not a falsification to list Mr. Kropp's name in the initial determination as one of the persons interviewed in the investigation. However, it is true that Mr. Kropp was not interviewed regarding the maintenance of effort issues. Viewed with the wisdom of hindsight, this was indeed a regrettable oversight. Mr. Kropp had been a steward in his union, an administrative assistant to PFWP Director Deal, a county employee for many years in the Welfare Department and he had a college education, thus he possessed a great deal of relevant information. At the time of the original investigation, however, Mr. Kropp was not the major complaining party on the maintenance of effort issues and apparently the investigators were not aware of the amount of information he possessed. The reason Mr. Kropp and the other 21 signatories to the 57 point complaint did not receive copies of the Grant Officer's initial determination was that Ms. Griswold held herself out to be their representative.

Complaint on DOL Federal Representative Wisor

2. Former area representative Bud Wisor's falsification of US DOL reports and deliberate failure to report known violations of law within the WAP.

This issue refers to alleged inaccuracies in the Milwaukee County assessment done by former Federal Representative Wilbert Wisor in FY 1978. In my opinion the evidence is insufficient to show that Mr. Wisor deliberately, knowingly or intentionally falsified the assessment or failed to report known violations of law within the WAP. I believe that Mr. Wisor's overly flattering opinion of the Mil-

waukee County CETA program was due more to misconceptions or inadvertent mistakes on his part and lack of knowledge of all the factors involved than it was to intentional falsehoods. Mr. Wisor was no longer an employee of the Department of Labor at the time of the hearing and he was not available to testify. Certainly, the record shows that Mr. Wisor's assessment did not deter the Grant Officer and subsequent Federal Representatives from doing thorough and highly critical assessments of the prime sponsor in 1979 and 1980 and I find no prejudicial error in this instance.

Complaint on DOL Federal Representative Cronin

4. The deliberate hiding of a major and continuing violation of law by Cathy Cronin. i.e., the "temporary employment program" at JVS.

I find that there is insufficient evidence at the hearing to prove such an allegation.[26]

Complaint Involving the use of HEW (HHS) Money

6. The failure of the Regional Administrator to provide HEW an opportunity to respond to the WAP plan for use of HEW money as required by law in FY 1977 and FY 1978.

There is insufficient evidence to show that the Regional Administrator had any copy of a "WAP plan for use of HEW money" in FYs 1977 and 1978. At that time ap-

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[26]Based upon paragraph 4 of ALJ Exhibit 69, apparently the Worker Rights Institute agreed that the underlying problem involved here was addressed and resolved in that "DOL eventually conducted an investigation subsequent to the July, 1979 meeting and recovered $38,000 in CETA money from JVS."

parently the only description of WAP in the Regional Office was a one page Project Data Summary on the Handicapped Serving the Handicapped program which included nothing about HEW money. Prime sponsors are not required to send copies of their subgrants to the Regional Office, much less copies of contracts between other parties, such as Title XX agreements between JVS and the County Department of Social Services. The procedures outlined in 29 CFR 98.34 require DOL to provide HEW with copies of prime sponsor grant applications; exchange of subgrant and contractual information is not required by the Act or regulations.

Complaint on the Denial of DOL Records

7. The wrongful denial of U.S. Department of Labor records in the possession of the Regional Administrator, that were necessary and continue to be necessary to the pursuit of this complaint, by the imposition of unauthorized fees.

The evidence on this issue concerns two information requests. One was a telephone request by Ms. Metoxen for Region V CETA letters, which the Grant Officer suggested she try to obtain from the prime sponsor. She did not file a Freedom of Information Act request with the Grant Officer. The other request was for assistance in obtaining subgrant information from the prime sponsor, which was not in the Regional Office files. The Regional Office did call Ms. Powers, who stated that the requested records would be made available for review and informed Ms. Griswold of this by letter.

The Freedom of Information Act, 5 USC 552, (FOIA) and the Privacy Act, 5 USC 552 a, govern the conditions

under which records maintained by federal agencies are permitted or required to be disclosed to the public. The FOIA authorizes agencies to charge reasonable copying fees, establishes administrative procedures for the resolution of FOIA disputes, and permits appeals following exhaustion of agency administrative remedies to the U.S. District Courts. The DOL administrative procedures for FOIA requests are further detailed in 29 CFR Part 70; the corresponding Privacy Act regulations are found in 29 CFR Part 70a. It appears that the Complainants did not use the proper FOIA procedures in this instance and that the FOIA does authorize charging reasonable copying fees. I find no violation of the Act or regulations in this issue.

Complaint on Institutional Review Board Protections

8. The failure of the Regional Office, the prime sponsor, and the Program Operator to provide WAP participants with rights and protections to subjects of experiments governed by Institutional Review Boards as required by 45 CFR 46.

The regulations at 45 CFR Part 46 are applicable by their terms only to HEW grants and contracts. 45 CFR 46.101. They are not applicable to programs funded under CETA. *Castle et al v. University of Wisconsin-Milwaukee CETA Review Project,* 80-CETA-9 (November 10, 1982). I find no violation of the Act or CETA regulations pertaining to this issue.

Complaint on Misappropriation of Funds

9. The deliberate misappropriation of funds by the Program Operator.

This allegation charges criminal activities by JVS or JVS officials. Of course, in an administrative proceeding

such as this I have no authority to convict anyone of any crime or to assess any criminal penalties. *Humphrey v. Arts Development Council of Milwaukee, Inc.*, 80-CETA-32 (January 29, 1982). In addition to the fact that neither JVS nor any of its officials or former officials is a party to this proceeding, the proper forum for trying criminal charges of the type referred to here would be the United States District Court. On the other hand, 20 CFR 676.86 (h) provides that investigation of any matter concerning a potential federal criminal violation shall be conducted as the Inspector General shall direct. Accordingly, the Grant Officer is ordered to furnish a copy of this decision to the Inspector General of the U.S. Department of Labor together with a copy of the Report of Audit of the Jewish Vocational Service of Milwaukee, Inc. for the period July 1, 1978 through December 31, 1979 and the Complainants' brief in this case with its frequent allegations of 18 USC 1001 violations and similar offenses for such action as the Inspector General deems appropriate.

Complaints Involving Monitoring and the JVS Audit

10. The failure of the prime sponsor to properly monitor the fiscal management of the program.

11. The failure of the Regional Office to properly monitor the fiscal management of the program.

12. The failure of the Regional Office to properly offset program income against program operations.

Under the Act and CETA regulations, it is the responsibility of a prime sponsor to monitor its subgrantees, 29 CFR 98.31; 20 CFR 676.22, 676.75-2, and to assure that they properly report program income. 29 CFR 98.19; 20 CFR

676.36. The Grant Officer's responsibility is to monitor the prime sponsor and the record shows that on several occasions the Grant Officer (DOL Regional Office) has criticized and sought corrective action in Milwaukee County's monitoring and financial management practices, including the reporting of program income.

With respect to accountability for program income, both the Grant Officer and the prime sponsor have had to deal with two roadblocks erected by JVS. First, whenever the issue was raised in the past, JVS denied that any CETA program income was being generated, claiming that any money earned had been used to offset the expenses of the program and that the program was being run at a loss. Second, the JVS accounting system was not set up in such a way as to provide the kind of information needed for full and accurate reporting of program income. As a result of the FY 1980 performance assessment the Grant Officer directed the County to develop and submit a written corrective action plan for reporting program income by January 1, 1981. Federal Representative Humphrey and DOL accountants rendered technical assistance in late 1980 and finally an acceptable plan was negotiated.

Although it appears that some amount of CETA program income has been generated in the WAP, the record is unclear as to how much and to what extent this income has been reported to the prime sponsor and DOL. As Ms. Humphrey testified, the only way to find out how much program income was generated and whether it was properly accounted for is through a detailed audit. The same is true of double billing allegations, to see if the same services were being billed to different funding sources, as for

example, to CETA and Title XX or other sources. Such a joint audit of JVS has now been performed with DOL participation at the request of Ms. Cronin, former Milwaukee County Federal Representative. A final audit report was issued on May 22, 1981.[27] However, the audit resolution process has not been completed. At the beginning of the hearing in this case I had thought that it might be possible for me to resolve the audit aspects of the case to preclude having another hearing, but it is obvious now that this cannot be done. There must be a separate CETA case to resolve the disallowance of costs spent under the CETA program raised by this audit. Because JVS is a subgrantee, the initial audit resolution responsibility lies with the prime sponsor. Once the prime sponsor has issued its ruling, JVS will be entitled to request a prime sponsor level hearing under 20 C.F.R. 676.83. The results of that hearing can then be appealed to the Grant Officer

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[27]Among the audit highlights, the examination disclosed that JVS received $999,074 in program funds to which they were not entitled. The auditors recommended the refunding of:

1. $533,290 in indirect costs for calendar 1979 to the appropriate state and local grantee agencies.

2. $2,020 to the Vocational Education program for the duplicate salary and wages claimed during the 6-month period ending December 31, 1978.

3. $217,933 to the CETA prime sponsor for net income generated from CETA activities between October 1, 1977 and September 30, 1979 that was not used to further CETA objectives.

4. $65,213 to the CETA prime sponsor for prohibited salaries and wages claimed between October 1, 1977 and September 30, 1979.

5. $180,600 to Milwaukee County for Title XX training costs claimed between May and December 1979 that were not sufficiently documented.

and the Grant Officer's determination can then be appealed to the Office of Administrative Law Judges. At these various levels each party must have its opportunity to present its side of the case, and when a CETA audit case arrives at this level, usually the only parties are the Grant Officer against the prime sponsor, or against the prime sponsor and one or more subgrantees, and the only issue is whether certain costs for expenditures under the CETA program should be allowed or disallowed and paid back to the Department of Labor. Obviously it would not be appropriate for me to try to order an enforcement of the audit's recommendations or any of them at this time under the circumstances here. Thus the audit-related issues must be severed from this proceeding and the Grant Officer is ordered to see that a separate CETA audit case is processed, and he is directed to issue his initial and final determinations on the CETA portion of the joint audit of JVS as soon as practicable.[28]

Complaint on Discrimination by the Regional Office Against Complainants.

13. Continuing discrimination by the Regional Office against individual complainants, who were not granted the same access to the Regional office, nor informed of the steps being taken to alleviate their complaint, as the access and information granted the Program Operator and the prime sponsor.

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[28]The report of audit and other correspondence pertaining to it is admitted in evidence as Complainant's Exhibit 75, and it has been considered by me as evidence bearing upon the other issues in this case.

I find there is insufficient evidence to support this allegation.

Complaint on Mismanagement of the Program Operator's Payroll

16. The Program Operator's payroll accounting system is deliberately mismanaged, resulting in needless errors and delays in participant wages and stipends.

The Grant Officer discovered problems with some delays and non-receipt of Title I checks mailed from Madison, but he found no violation of the Act, regulations or grant. At the hearing there was evidence that these problems occasionally still occurred, although it appeared that at least part of the problem may have been attributable to participants who had put the wrong address on their forms. The record contains insufficient evidence to prove deliberate mismanagement and in my opinion it should be characterized as mere negligence or inadvertance. I find no violation of the Act, regulations or grant pertaining to this issue.

The Complainants' request for court costs is denied.

Except for those matters in which I have modified or changed the Grant Officer's final determination, it is affirmed.

ORDER

Milwaukee County, the CETA prime sponsor, is ordered to do the following:

1. Within 90 days from the date of this order, to pay to the U. S. Department of Labor the amount of disallowed costs of the approximately 36 ineligible CETA employees, as computed and determined by the Grant Officer.

2. Within 60 days from the date of this order to classify all the work experience jobs in the WAP by job titles, duties, responsibilities and supervision, determine the proper wages and benefits for each CETA employee, including those affected by the Davis-Bacon Act, and submit this information to the Region V Department of Labor Grant Officer for review.

3. Within 120 days from the date of this order to pay to any and all former CETA employees any additional amount which is required to equal their full wages and benefits during their CETA employment, as determined by the Grant Officer, together with interest at 6 percent per annum on this additional amount. Although these amounts may be paid from CETA funds, if, due to changed circumstances, federal funds are not available for the payment of these back wages and benefits and the expenses involved in determining these, then the prime sponsor must pay these out of its own funds.

4. To continue to take corrective action to insure that subgrant contracts are written and signed on or before their effective dates.

5. To pay interest at the rate of 6 percent per annum on all back pay for CETA employees required to be paid by this decision and by the Grant Officer, including the back pay that was paid to David L. Duffey, Joseph R. Weisenburger, Chester P. Cholka, Bernard J. Klees, and Raymond S. Kaleta.

6. Within 60 days from the date of this order to take affirmative steps to locate Cheryl Tucker, to offer her reinstatement to a position comparable to that which she held in the PFWP and to pay her back wages and interest

at the rate of 6 percent from non-CETA funds, however, such back wages and interest may be offset upon proof submitted to the Grant Officer of any wages Ms. Tucker earned, or of any General Assistance paid to her by the County following her layoff from the PFWP.

7. Within 60 days from the date of this order to pay to Lori Baker back pay for the period of May 8, 1978 to October 6, 1978, together with interest at the rate of 6 percent per annum from non-CETA funds.

8. Within 120 days from the date of this order to pay the sum of $1,199,245.00 to the U. S. Department of Labor as disallowed costs for a maintenance of effort violation in failing to maintain the 1976 level of non-federal spending during the years 1977 and 1978.

9. Within 120 days from the date of this order to pay to the U. S. Department of Labor an amount of disallowed costs, as determined by the Grant Officer, for wages of CETA employees who did work under the JVS Project Clean program or similar work that had been done by "homemakers" employed by Milwaukee County who had been laid off near the time the CETA participants began doing that work.

10. Within 120 days from the date of this order to pay to the U. S. Department of Labor an amount of disallowed costs, as determined by the Grant Officer, for wages of CETA employees who worked at the E. R. Wagner Company and displaced other workers there and caused them to be laid off.

If the prime sponsor fails to comply with any part of this order, then all federal financial assistance from, or

administered by or under the control of the U. S. Department of Labor will be terminated until such time as the prime sponsor complies fully with this order in its entirety.[29]

The Region V DOL Grant Officer is ordered to do the following:

1. Within 60 days from the date of this order to determine the costs of the approximately 36 employees that were transferred from the PFWP to the WAP in 1978 who were found to be ineligible for their CETA jobs and to furnish this information to the Milwaukee County CETA prime sponsor.

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[29]20 C.F.R. 676.91(c) states in part that the Administrative Law Judge shall have the full authority of the Secretary of Labor in ordering relief and that "orders for relief may provide for suspension or termination of, or refusal to grant or continue federal financial assistance in whole or in part, and may contain such terms, corrective action, conditions, sanctions [including awards of back pay], reallocations, and other provisions as are consistent with and will effectuate the purposes of the Act and regulations issued thereunder, including provisions designed to insure that no federal financial assistance will thereafter be extended under such program unless and until the prime sponsor . . . corrects its noncompliance and makes satisfactory assurance that it will fully comply with the Act and regulations."

This provision to ensure prompt execution of this order is deemed necessary because on the two previous cases in which I have ordered this prime sponsor to make payments within a certain time, the prime sponsor failed to do so. *Peters v. Milwaukee County* 79-CETA-198 (March 24, 1981) aff'd. 682 F.2d 609 (7th Cir. 1982); *Humphrey v. Arts Development Council of Milwaukee County, Inc., and Milwaukee County, Wis.*, 80-CETA-32 (January 29, 1982). I am aware of the Federal Claims Collection Act of 1966 (FCCA), 31 U.S.C. 952, as implemented by 4 C.F.R. Chapter II, however, I still feel that this sanction of termination of all federal financial assistance is needed in addition to the FCCA to insure compliance in this case.

2. Within 90 days from the date of this order to review the prime sponsor's wage and benefit determination of CETA employees, verify its accuracy, make any necessary corrections or adjustments, and inform the prime sponsor of the results of his review and verification and as to any and all amounts that are required by the Act and regulations to be paid to the former CETA employees to make up their proper and full wages and benefits.

3. Within 90 days from the date of this order to determine the costs of wages of CETA participants who did work under the JVS Project Clean program or similar work that had been done by "homemakers" employed by Milwaukee County who had been laid off near the time the CETA participants began doing that work and to furnish this information to the prime sponsor.

4. Within 90 days from the date of this order to determine the costs of wages of CETA employees who worked at the E. R. Wagner Company and displaced other workers there and caused them to be laid off and to furnish this information to the prime sponsor.

5. To furnish a copy of this decision to the Inspector General of the U. S. Department of Labor, together with a copy of the Report of Audit of the Jewish Vocational Service of Milwaukee, Inc., for the period of July 1, 1978 through December 31, 1979, as well as a copy of the Complainant's brief in this case, for such action as the Inspector General deems appropriate.

6. To see that a separate CETA audit case is processed and to issue his initial and final determinations on

the CETA portion of the aforementioned Joint Audit of JVS as soon as practicable.[30]

/s/ Robert S. Amery
Administrative Law Judge

Dated: 5 Dec. 1983
Washington, D. C.
RSA/mc

SERVICE SHEET

Case Name: The Workfare Coalition et al

Case No. 80-CETA-146

A copy of the Decision and Order was mailed to the parties below on 5 Dec 1983.

/s/ Margaret Carlisle
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[30]This decision shall become the final decision of the Secretary of Labor unless the Secretary modifies or vacates it within 30 days after it is served. 20 C.F.R. 676.91(f).

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TWC

The Workfare Coalition

February 20, 1978

Mr. Richard Gilliland
Regional Manpower Administrator
230 South Dearborn Street
Chicago, Illinois 60609

FORMAL
COMPLAINT NO. 78-CETA-5-163-C

Dear Mr. Gilliland:

I am writing you at the suggestion of Herman Scott, assistant to Assistant Secretary of Labor Arnold Packer. Mr. Scott advised me that you would be interested in the situation in Milwaukee regarding subcontracts with the Jewish Vocational Service and the Rehabilitation Council.

Basically, we have found irregularities in both the spirit and the letter of the CETA regulations.

For example, there is no grievance procedure for the CETA project workers (the people assigned to work projects from the general assistance rolls) under JVS, nor has there been a grievance procedure since JVS started the program last July, 1977. The Workfare Coalition has applied for fair hearings on behalf of aggrieved clients and has had no success in gaining such hearings. The people are no longer on welfare, so the welfare department won't hear them, even though they were assigned by the welfare department. The Administrative Review Committee (set up last July 12, 1977) won't hear them, even though the committee was especially established for just such hearings, because the County Executive O'Donnell never bothered to appoint the committee. JVS doesn't have a hearing procedure, so they won't hear the grievances. And now the County Executive's assistant, Mr. Golden, has ordered

the welfare department to hear the cases, but they are not the agency with jurisdiction. The welfare department hearing examiner told us to apply for hearings "to the CETA Agency", but the Manpower office has no grievance procedure for participants in CETA.

For another example, JVS has been assigning 18 to 21-year-olds (more than 150 of them) to a CETA III funding source, although keeping them at their same assignments. There are two peculiarities here: first, there is not a penny of CETA III money in this county (there have been people assigned to CETA III since Jan. 1, 1978), and second, CETA regulations seem to forbid substitution of federal CETA funds for local funds to get the same work done or to fund the same positions.

There is no current CETA I contract between the County and JVS. The old contract expired on Dec. 31, 1977, and the new one is not yet finished, although JVS keeps on getting money from the County.

Scores of participants are not getting paid. Some of them have gone as long as 6 weeks without a penny coming to them from JVS. Since they are listed as JVS employees, the welfare department will not reopen their cases, and so they go hungry. Attempts to track down the reasons for non-payment have led to contacts by telephone with as many as 15 different JVS and welfare department employees, none of whom knew the answer and all of whom denied responsibility for non-payment.

It has been my experience during the last month that JVS and welfare officials have made a policy of denying knowledge of non-payment, wrong assignments, and other participant hardships. Our organization has called top officials in both organizations in an effort to discover the source of the hardships for participants. The top officials deny that anything out-of-the-ordinary is occurring, and have in fact denied that people are not getting checks.

There are other severe problems, such as JVS's diagnosis of the general assistance people as handicapped, and JVS's placement of 68.4% of them into sheltered work-

shops. The sheltered work is funded under Title VI. The people are not physically, emotionally, or psychologically handicapped: they are poor and unemployed. JVS has expanded the definition of handicapped to include the poor and the unemployed. We expect that this labelling as handicapped and the placement in sheltered workshops will result in an even lower chance of becoming employed at the end of the year of CETA Title VI employment.

The Title I, Title VI and "Title III" participants at JVS and in JVS subcontractors' facilities are only allowed to work 20 to 22 hours per week at minimum wage.

"Training" and "work experience" are being inappropriately used. The federal regulations talk of the inappropriateness of these experiences for those who simply need jobs. That is the case in a number of instances in the JVS and Rehabilitation Council programs.

In those cases where people in Title VI and "Title III" are doing bargaining unit work, they are not receiving prevailing wage for this work.

In those cases where former Pay for Work program employees were transferred to Title VI and "Title III", they retained their old positions, but at a new drop in pay, due to the great cut in hours. This constitutes a substitution of federal funds for local monies to do the same jobs.

In those cases where participants in the training phase (Learn to Earn) funded by Title I have filed complaints against harrassment, humiliation, and infringements against their privacy, they have been harrassed, humiliated, and embarrassed by the instructor. CETA regulations are supposed to protect participants against harrassment resulting from complaints or grievances.

We have scores of case histories, documenting all of the above irregularities and many, many more. We have internal documents, memoranda, copies of proposals and contracts, and letters which add to the documentation.

The Workfare Coalition hereby asks for a full audit and investigation, both regarding financing and regarding programming. There are too many poor people being hurt by this program to allow these abuses to continue.

Sincerely,

/s/ Mary B. Griswold
for the Coalition

THE WORKFARE COALITION

May 25, 1978

Assistant Secretary Ernest Green
Department of Labor
Constitution and 3rd Avenues, N.W.
Washington, D.C. 20013

Dear Dr. Green:

Milwaukee agencies and community organizations have become very concerned with the CETA I, III, and VI programs run in Milwaukee County by the Jewish Vocational Service and the Rehabilitation Council of Greater Milwaukee. The CETA programs run by these agencies are called the Work Assistance Program and are specifically designed to replace the county-funded general assistance employment program.

The Work Assistance Program is centered around a program of psychological testing, evaluation, training of job-search skills, and work experience placements in sheltered workshops. The program also includes career possibility assessment, work experience with non-profit agencies, and job placement in the private sector.

A series of complaints have been filed with the prime sponsor and with the regional CETA office in Chicago, informing them of the serious irregularities in the Work Assistance Program and asking them to investigate the program, but there apparently has been no action of any kind on the charges, except to assign the case a number.

Basically, the Work Assistance Program is violating the rights of participants and is violating federal regulations. The regional office has done nothing. The prime sponsor has done nothing. We, as CETA participants, representatives of community-based local organizations, and as affected individuals, request that you investigate the Work Assistance Program's violations of participants' rights, the disregard of CETA regulations, the regional director's disinterest, and we ask that the Department of Labor take

immediate steps to remedy the situation in Milwaukee County.

Following are the filed complaints and irregularities:

1. The Work Assistance Program has failed to notify participants of their rights to hearings, to grievances, and to appeals to the CETA agency and to DOL.

2. The Work Assistance Program has failed to provide CETA VI participants with health coverage afforded other employees.

3. The Work Assistance Program has denied CETA VI participants the right to collectively bargain and be covered by existing collective bargaining agreements.

4. The Work Assistance Program has denied CETA VI participants the opportunity for advancement, cost of living raises, promotion, and other benefits of regular employees.

5. The Work Assistance Program has failed to pay many participants in the program.

6. The Work Assistance Program has failed to pay some participants at the minimum wage rate.

7. Participants in the CETA VI portion of the Work Assistance Program were denied opportunities to move into supervisory positions of the CETA III portion of the Work Assistance Program solely on the basis of age.

8. The Work Assistance Program does not provide appropriate training to most participants.

9. The Work Assistance Program has not informed participants of their rights and benefits since the program began in July, 1977, despite repeated requests for the establishment of due process.

10. The Work Assistance Program has failed to inform participants of the identity of their employer prior to their entering the program and while they are in it.

11. Inappropriate placements are being made by the Work Assistance Program.

12. Most placements after training are in lower-wage positions.

13. The Work Assistance Program is making inappropriate diagnosis of the unemployed as handicapped and placing these nonhandicapped participants in sheltered workshops designed for the handicapped.

14. Psychometric/psychological testing is done on all participants without informed consent.

15. Intelligence testing is done on all participants without informed consent.

16. Intelligence, psychological, vocational, and other testing is done on all participants without explanation and without explaining how the tests will be used, what they mean, who will see them, and why they are being given.

17. Participants are told they must take the tests or be terminated from the program.

18. Testing is done by untrained personnel, such as classroom teachers.

19. Tests are evaluated and assessments are made by unqualified personnel.

20. No comprehensive plan is followed. Participants are shunted from one program to another solely on the basis of funding schedules.

21. The Work Assistance Program placed more than 100 young people into a CETA III program in January and February. There was no CETA III program or money in Milwaukee County until April, 1978. Repeated requests for information and clarification brought no answers from the program operator, the local CETA office, the prime sponsor, and the regional director.

22. The Work Assistance Programs transferred participants into the Work Assistance Program and cut the number of hours they were allowed to work, thereby lowering their take-home wages.

23. The Work Assistance Program does not pay prevailing wages to Title VI participants.

24. Wage rates are uniformly minimum rate and do not reflect the differing requirements of the jobs participants are performing.

25. Work Assistance Program participants are performing tasks of regular public service employees and are still paid at the minimum rate.

26. The Work Assistance Program has discriminated against participants on the basis of age.

27. The Work Assistance Program has terminated participants solely on the basis of age.

28. The Work Assistance Program has discriminated against participants on the basis of marital status.

29. The Work Assistance Program has discriminated against participants on the basis of handicap. Disabled or handicapped individuals are not allowed in the program.

30. Participants have been harassed when they have complained about working conditions and when they have asked for information on their rights and benefits .

31. There are no supportive services provided.

32. Participants are switched from one CETA title to another without being informed that such a change has taken place.

33. The Work Assistance Program has denied participants' requests for access to their files and records.

34. The Work Assistance Program has terminated a participant when he asked for information on the program.

35. Notices of grievance hearings frequently are not mailed or are not delivered until the day of the hearing or after the hearing is over.

36. Decisions reached in grievance hearings are not carried out.

37. Decisions reached in grievance hearings affecting an entire class of participants are not announced to other

participants and those decisions do not affect them or their activities in any way.

38. The Work Assistance Program hearing officer is the Work Assistance Program director.

39. Community-based organizations were not consulted in designing the Work Assistance Program.

40. Appropriate labor organizations were not consulted in designing the Work Assistance Program.

41. The CETA Advisory Council was disbanded for 9 months and was not consulted in designing the Work Assistance Program until the contracts had already been signed, the program was underway, and monies were being disbursed.

42. Information on participant placement in nonsubsidized employment is deliberately obscured.

43. The Work Assistance Program transferred participants into CETA programs directly from other employment programs. These participants were not unemployed at the time of the transfer.

44. For many months, there were no contracts on file between Milwaukee County and the Rehabilitation Council (CETA VI) and Milwaukee County and JVS (CETA I). Consequently, federal monies have been distributed to program operators who have not signed assurances and certifications to prevent abuses. The Regional Office was informed and refused to take action.

45. Contracts have commonly been written 6 months after the programs have gone into effect.

46. The Work Assistance Program has failed to establish a grievance process from June, 1977 to February, 1978. The written process now promoted as a response to federal regulations doesn't work. The grievance process as written require more than 7 separate meetings, hearings, conferences, etc. of the participants, doesn't clearly define procedures and format, and does not have an impartial examiner.

47. The Work Assistance Program does not comply with Davis-Bacon Act provisions.

48. The Work Assistance Program has impaired existing contracts and has resulted in the substitution of funds.

49. The Work Assistance Program has been used to replace regular employees.

50. The Work Assistance Program has substituted federal funds for local funds to maintain the same work load.

51. The Work Assistance Program has resulted in the substitution of federal funds for over $800,000 in County general assistance funds.

52. The Work Assistance Program has hired a public relations firm with $5,000 of CETA funds to counteract media publicity about the program.

53. The prime sponsor has made no effort to bring the Work Assistance Program into compliance with federal regulations.

54. The prime sponsor's CETA office has made no effort to bring the Work Assistance Program into compliance with federal regulations.

55. The prime sponsor has refused to provide documents accounting for expenditures of funds by the Work Assistance Program.

56. The prime sponsor has refused to monitor subcontractors and subgrantees to insure that they in fact possess grievance procedures and that CETA employees in the subagencies have access to due process rights.

57. The prime sponsor's agents have threatened, intimidated, and coerced local agencies and organizations into cooperating with the Work Assistance Program.

To arrange a meeting with the undersigned and you and to transmit information and documentation, please contact Mary Griswold, Worker Rights Institute, 1347 N. 12th St., Milwaukee, Wis. 53205, (414) 342-2022.

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Milwaukee Urban League, Director

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Affected Member—Local 594 AFSCME

Dismas Becker
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WAP Participant

Mildred Gillum
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Jesus Mireles
I.C.D.P.—South

Marcia P. Coggs
State Assembly—18th District

SUPREME COURT OF THE UNITED STATES

No. A-413

MILWAUKEE COUNTY, WISCONSIN,

Applicant,

v.

WILLIAM E. BROCK, SECRETARY, UNITED STATES DEPARTMENT OF LABOR

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 2, 1986.

/s/ John Paul Stevens
Associate Justice
of the Supreme
Court of the
United States

Dated this 26th day of November, 1985.

Supreme Court, U.S.
FILED
MAR 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1109

In the Supreme Court of the United States

OCTOBER TERM, 1985

MILWAUKEE COUNTY, WISCONSIN, PETITIONER

v.

WILLIAM E. BROCK, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether Section 106(b) of the Comprehensive Employment and Training Act of 197 , 29 U.S.C. (Supp. V 1981) 816(b), which stated that the Secretary of Labor "shall" issue a final determination within 120 days of the receipt of a complaint alleging the unlawful use of CETA funds by a grant recipient, barred the Secretary from recovering misused grant funds when he failed to issue a final determination within the 120-day period.

2. Whether the Secretary of Labor correctly found that petitioner violated the "maintenance of effort" requirements applicable to CETA grant recipients.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1109

MILWAUKEE COUNTY, WISCONSIN, PETITIONER

v.

WILLIAM E. BROCK, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-39) is reported at 771 F.2d 983. The opinion of the administrative law judge (Pet. App. 45-151) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 42) was entered on August 6, 1985, and a petition for rehearing was denied on September 9, 1985 (Pet. App. 43-44). On November 26, 1985, Justice Stevens issued an order extending the time within which to file a petition for a writ of certiorari to and including January 2, 1986, and the petition was filed on December 30, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Comprehensive Employment and Training Act of 1973 (CETA), 29 U.S.C. (Supp. V 1981) 801 *et seq.*, authorized the Secretary of Labor to grant federal funds to qualified entities, such as states and local government units, for programs "provid[ing] job training and employment opportunities for economically disadvantaged, unemployed, or underemployed persons." 29 U.S.C. (Supp. V 1981) 801; see also S. Rep. 95-891, 95th Cong., 2d Sess. 4, 42-43 (1978); H.R. [illegible]-659, 93d Cong., 1st Sess. 1-3 (1973).[1] The statute [illegible]me was carefully constructed to ensure that programs financed with CETA funds would further the purposes of the Act. Thus, the statute prescribed detailed eligibility standards for participants in CETA programs and set forth the terms and conditions governing the employment of such program participants. See 29 U.S.C. (Supp. V 1981) 823-827; see also 20 C.F.R. 675.5 *et seq.*, 676.21 to 676.30a, 676.51 to 676.76. Each grant recipient was required to submit assurances that its program would comply with all applicable statutory and regulatory requirements (29 U.S.C. (Supp. V 1981) 813(a)(21)). These conditions included a set of "maintenance of effort" requirements designed to ensure that a grant recipient would use CETA funds to supplement—and not replace—local funds expended in providing similar jobs or public services. See, *e.g.*, 29 U.S.C. (1976 ed.) 845(c)(8) a[illegible]d (25), 848(a)(1)(C), 983(7) and (11); 29 C.F.R. 96.24, 97.334, 99.34 (1977).[2]

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[1]The statu[illegible] originally was enacted in 1973 (Pub. L. No. 93-203, 87 Stat. 839 *et se*[illegible] and was amended substantially in 1978 (Pub. L. No. 95-524, 92 Stat. 1909 *et seq.*). The CETA was repealed effective October 13, 1982, and replaced by the Job Training Partnership Act, 29 U.S.C. 1501 *et seq.* (see Pub. L. No. 97-300, § 184(a)(1), 96 Stat. 1357). However, the CETA continues to govern administrative or judicial proceedings pending on September 30, 1984 (29 U.S.C. 1591(e)).

[2]The conduct that forms the basis for the finding that petitioner violated the maintenance of effort requirements occurred prior to the

The statute provided that the Secretary of Labor could conduct audits of grant recipients "[i]n order to assure that funds provided under [the CETA] are used in accordance with its provisions" (29 U.S.C. (Supp. V 1981) 835(a)).[3] In addition, the statute permitted any interested person, such as a program participant, to file a complaint with the Secretary alleging that a grant recipient had failed to comply with CETA standards (29 U.S.C. (Supp. V 1981) 816).

Section 106(b) of the Act, 29 U.S.C. (Supp. V 1981) 816(b), stated that if the Secretary obtained information—either as the result of an audit or through the receipt of a complaint—concerning a grant recipient's failure to adhere to the Act's requirements, the Secretary was required to investigate the matter. The same provision then stated that "not later than 120 days after receiving the complaint," the Secretary "shall" make a "final determination" regarding the allegation involved (*ibid.*). If after notice to the grant recipient and an opportunity for a hearing, the Secretary found that the grant recipient violated the CETA's requirements, the Secretary expressly was authorized to order the

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effective date of the 1978 CETA amendments. The substantive provisions of the 1973 statute therefore apply in this case. Pet. App. 3 n.1; see *Bennett* v. *New Jersey*, No. 83-2064 (Mar. 19, 1985).

[3]Typically, an audit was performed or arranged by the Department of Labor's Office of Inspector General and the audit report was forwarded to the Department of Labor grant officer responsible for the particular grant. The grant officer provided the grant recipient with an opportunity to comment on the report, issued an initial determination, offered to attempt informally to resolve the dispute, and then issued a final determination. 20 C.F.R. 676.86(d), 676.88. The grant recipient was entitled to a hearing before an administrative law judge (ALJ) with respect to the grant officer's final determination. The ALJ then rendered a decision that, if not modified or vacated within 30 days, became the final decision of the Secretary. A decision adverse to the grant recipient or another interested person was subject to judicial review in a court of appeals. 29 U.S.C. (Supp. V 1981) 816(b), 817(a); 20 C.F.R. 676.88 to 676.92.

grant recipient to repay any misspent funds to the United States. 29 U.S.C. (Supp. V 1981) 816(b) and (d).

2. Beginning in the 1930's, petitioner operated programs funded with local revenues that provided work experience jobs to recipients of general assistance; during the 1970's, this program was known as the "Pay for Work Program" (PFWP). The PFWP "provided 550 to 750 minimum-wage positions, primarily within the county government, for individuals who would otherwise be receiving cash welfare grants." Pet. App. 15-16.

During the first half of 1977, petitioner began planning new CETA-funded programs to provide training and work experience to individuals eligible for general assistance—the same class of individuals served by the PFWP. These CETA programs, "Learn-to-Earn" and "Handicapped Serving the Handicapped," began operation in July 1977; in early 1978, they were merged to form the "Work Assistance Program" (WAP). The WAP was funded by local revenues and the CETA grants received by petitioner. It served the same general assistance population as the earlier CETA programs. Pet. App. 17-18, 50-51.

During the second half of 1977—when the CETA programs were getting underway—petitioner began to refer fewer general assistance applicants seeking employment to the PFWP; petitioner instead referred such applicants to the CETA-funded programs (Pet. App. 18). The PFWP was discontinued completely in 1978; all eligible applicants then were referred to the CETA-funded WAP (*id.* at 18, 124). Thus, in 1976—the year before petitioner began using CETA funds to provide job training and work experience positions for persons receiving general assistance—petitioner spent $3,014,580 on the PFWP. Petitioner's expenditures of local funds for these purposes decreased to

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$2,097,428 in 1977 (for the PFWP) and to $2,732,487 in 1978 (for the PFWP and the local share of the WAP) (*id.* at 16, 19, 115, 127).

3. Several complaints were filed with the Department of Labor in 1978 alleging that petitioner had violated a variety of statutory and regulatory requirements in connection with its expenditures of CETA funds (Pet. App. 46-48). The particular claim that is relevant here was that during 1977 and 1978 petitioner violated the CETA maintenance of effort requirements by substituting CETA grants for local funds that otherwise would have been spent to create work experience positions for individuals eligible for general assistance (*id.* at 2-3, 109-114).[4] Following an investigation, the grant officer issued a final determination on January 4, 1980, almost two years after the initial complaint was filed, stating that petitioner had not violated the maintenance of effort requirements by eliminating the locally-funded PFWP and replacing it with the CETA-funded WAP (*id.* at 3, 114).[5]

The complainants sought review of the grant officer's determination before an administrative law judge (ALJ). The ALJ reversed the grant officer's determination regarding the maintenance of effort issue (Pet. App. 124-127). He found that "[t]he record leaves absolutely no doubt that the major purpose of the WAP was to save [petitioner] tax levy dollars previously spent on both General Assistance and the PFWP by creating a new employment and training

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[4]The other allegations included, for example, claims that program participants were not notified of their rights under the CETA program (Pet. App. 48-49), that ineligible participants had been hired by petitioner (*id.* at 55), and that petitioner paid program participants improperly low wages and benefits (*id.* at 63).

[5]The grant officer did find that petitioner violated these requirements by displacing eight staff employees of the PFWP when that program was replaced by the WAP (Pet. App. 113).

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program for General Assistance eligibles to be supported by Federal CETA dollars. The substitution of the CETA funded WAP for the County funded PFWP did result in the substitution of Federal for other funds in connection with work that would otherwise be performed" (*id.* at 123-124). The ALJ further found that "[t]here is no question that the WAP was the functional replacement for the PFWP in Milwaukee County—both provided work experience jobs for General Assistance eligibles in lieu of cash grants. This functional equivalence is sufficient to make the two programs comparable for purposes of determining possible maintenance of effort violations" (*id.* at 124).

In ascertaining whether petitioner violated the maintenance of effort requirements by replacing the PFWP with the WAP, the ALJ selected 1976 as the base year for assessing petitioner's expenditures of local funds because "it was the most recent year in which no CETA money was expended on the General Assistance program" (Pet. App. 126-127). Comparing petitioner's 1976 expenditure for job training for general assistance recipients with petitioner's expenditures for that purpose in 1977 and 1978, the ALJ found that petitioner "failed to maintain effort in those years"; petitioner's expenditures fell by a total of $1,199,245 from their 1976 level (*id.* at 127). As the remedy for this violation of the maintenance of effort requirements, the ALJ disallowed an equal amount of petitioner's CETA costs and ordered petitioner to repay that sum to the United States (*id.* at 127, 148).

The ALJ also determined, in reviewing the complainants' allegations that the Department of Labor did not process their complaints in a timely manner, that the time taken by the grant officer to issue the final determination in this case was "not unreasonable" (Pet. App. 137). He observed that the grant officer's investigation was extremely time consuming because "[t]he complaints in this case were far more

numerous and more complex than the typical CETA complaints," and noted that the grant officer conducted interviews of 67 persons (*id.* at 136). The ALJ found, moreover, that the legislative history of the 1978 CETA amendments—which included Section 106(b)—indicated that the 120-day limit for the issuance of a final determination by the grant officer "was not intended to be jurisdictional in nature" (Pet. App. 137). The ALJ's decision became the final decision of the Secretary (see 20 C.F.R. 676.91(f)), and petitioner sought judicial review in the court of appeals pursuant to 29 U.S.C. (Supp. V 1981) 817.

4. The court of appeals affirmed by a divided vote (Pet. App. 1-39). The court unanimously held that the Secretary's failure to issue a final determination within the 120-day period set forth in Section 106(b) did not bar the Secretary from recovering misused grant funds (Pet. App. 4-15). The court noted that the 1978 CETA amendments—which included Section 106(b)—were "intended to give the Secretary greater power to prevent and correct the fraud and abuse that had developed in CETA programs" (Pet. App. 5). The court observed that in view of this legislative background "it would indeed be incongruous to conclude that Congress would have the Secretary divested of jurisdiction under § 106(b) when he does not render his final determination within four months of the receipt of the complaint" (*id.* at 8). The court further noted that the sponsor of the House floor amendment that became Section 106(b) expressly declared that the provision was not intended to limit the Secretary's jurisdiction (Pet. App. 6-8). Finally, the court stated that its interpretation of Section 106(b) was supported by the rule that a statutory time limitation relating to government action is not jurisdictional unless it both expressly requires an agency to act within a particular time period and specifies a consequence for failure to comply with the time limitation (Pet. App. 9, 11-12).

The court of appeals remarked that the complexity of the present case "vividly illustrates why the 120-day limit cannot be construed as jurisdictional" (Pet. App. 9). It found that "[t]he requirement of a final determination from the Grant Officer in 120 days under these facts would be a practical impossibility at best, and the effect of such a construction would be to remove completely disputes of this kind from the Secretary's jurisdiction and to extinguish absolutely the claims of innocent complainants, even though they were in no way untimely or at fault in initiating the action" (*id.* at 10-11).

With respect to the merits of the Secretary's decision, the court of appeals held that petitioner violated the maintenance of effort requirements applicable to CETA grantees (Pet. App. 15-24). The court first found that the Secretary correctly determined that 1976 was the appropriate base year for determining whether petitioner violated the maintenance of effort requirements because it was "the most recent year in which no CETA money was expended" to provide job training and work experience (Pet. App. 22). The court observed that the maintenance of effort inquiry focuses on the "level of funding," not on the "number of individuals in a given program" (*ibid.*). If petitioner had maintained its expenditures of local funds at the 1976 level "some portion of the work-experience positions and public services provided by the [CETA-funded programs] would * * * have been funded by non-federal money. Because [petitioner] did not [maintain this local funding], work and services were performed as a result of the substitution of federal funds for non-federal funds" (*ibid.*). The court held that this substitution of CETA funds for local funds violated the maintenance of effort requirements.

The court of appeals rejected petitioner's contention that its decreased expenditure of local funds in 1977 was justified because it was the result of petitioner's decision to reduce

PFWP employees' wages and hours as permitted by this Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), overruled, *Garcia* v. *San Antonio Metropolitan Transit Authority*, No. 82-1913 (Feb. 19, 1985), and did not reflect a reduction in the number of individuals participating in the PFWP. The court first noted that petitioner's rationale explained only 71% of the shortfall in expenditure of local funds for 1977 and 1978 (Pet. App. 23). It found that, in any event, petitioner "cannot discharge its obligations under CETA by simply retaining the same number of employees at a reduced annual salary while using CETA funds to provide employment for similarly situated individuals" (*ibid.*). The court observed that petitioner "did in fact originally intend to expand PFWP in 1977 with a considerably larger budget, but subsequently reduced the program * * * after it was known that CETA funds were available" (*id.* at 24). The court concluded that petitioner therefore could not rely upon the lower wages permitted by *National League of Cities* to explain its budget reduction.[6]

Judge Coffey dissented with respect to the maintenance of effort issue (Pet. App. 34-39). He concluded that petitioner had instituted "cost-saving measures" in 1977 when it reduced its employees' wages and hours (*id.* at 36-39). In his view, the majority's approach penalized petitioner by requiring it "to use the [cost] savings to employ more general assistance welfare recipients in its own program" (*id.* at 38).

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[6]The court also affirmed the Secretary's disallowance of costs for 17 program participants who did not satisfy CETA eligibility standards (Pet. App. 28-31), and the award of backpay to a PFWP employee (*id.* at 31-33). The court modified the Secretary's determination regarding the propriety of the wages and benefits paid by petitioner to CETA employees (*id.* at 24-28).

ARGUMENT

1. The first question presented in this case is the same as the issue now before the Court in *Brock* v. *Pierce County*, cert. granted, No. 85-385 (Nov. 4, 1985); *i.e.*, whether Section 106(b) of the 1978 CETA bars the Secretary of Labor from recovering misspent CETA funds when he fails to issue a final determination within 120 days.[7] Here, the court of appeals upheld a determination of the Secretary directing the repayment to the United States of misspent CETA funds despite the fact that the Secretary did not issue a final determination within 120 days. We demonstrated in our brief in *Pierce County* (at 11-32) that this interpretation of Section 106(b) is correct because it accords with a settled rule of statutory construction as well as the explicit legislative history and purposes of the CETA. With respect to this question, therefore, the Court should hold the petition for a writ of certiorari pending its decision in *Pierce County*.

2. The court of appeals' decision upholding the Secretary's finding that petitioner violated the CETA maintenance of effort requirements does not conflict with any decision of this Court or any other court of appeals. Further review of this fact-bound issue is not warranted.

We note at the outset that the CETA has been repealed (see note 1, *supra*), and that the specific question presented here is therefore of limited future significance. Petitioner asserts (Pet. 14) that the court of appeals' decision "raises important and recurring problems" concerning the interpretation of maintenance of efforts requirements under other statutes, but it cites no decisions in any way indicating that there exists a dispute about the meaning of such statutory requirements.

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[7]We have served counsel for petitioner with a copy of our brief in *Brock* v. *Pierce County*.

Moreover, the decision of the court of appeals is correct. The CETA contained "a number of 'maintenance of effort' provisions designed, in general, to require CETA grantees to use CETA funds to create *new* employment and training opportunities, to guard against the displacement of current civil-service employees, and to ensure that federal grants [were] not substituted for local funding of the same jobs or public services." Pet. App. 20 (emphasis in original; footnote omitted); see 29 U.S.C. (1976 ed.) 845(c)(8) and (25), 848(a)(1)(C), 965(b), 983(7) and (11); 29 C.F.R. 96.24, 97.334, 99.34 (1977). These maintenance of effort requirements furthered Congress's intent to *increase* employment opportunities for the persons served by the statute. See S. Rep. 95-891, 95th Cong., 2d Sess. 42-44 (1978); H.R. Conf. Rep. 94-1514, 94th Cong., 2d Sess. 16 (1976). Here, the court of appeals upheld the Secretary's determination, based upon record evidence, that petitioner violated the CETA maintenance of effort requirements by reducing its expenditures of local revenues for job training and work experience programs after instituting substantially equivalent programs funded with CETA grants. Accord *Maine* v. *United States Dep't of Labor*, 669 F.2d 827, 830 & n.6 (1st Cir. 1982) (budget data showing decrease in local funding for substitute teachers coincident with increased use of CETA-funded substitute teachers permits inference of maintenance of effort violation).

Petitioner first contends (Pet. 17-18) that the court of appeals erred by using 1976 as the base year for determining whether petitioner had reduced its expenditures of local funds. It is uncontested, however, that 1976 was the last year in which petitioner used only its own funds—and not CETA funds—to provide job training and work experience for persons eligible for general assistance payments (Pet. App. 17-18, 126-127). The very purpose of the maintenance of effort requirements was to ensure that a CETA grant recipient would maintain its pre-CETA commitment to

equivalent programs. The court of appeals therefore correctly held that 1976 was the proper benchmark for purposes of the maintenance of effort determination. Accord *Maine* v. *United States Dep't of Labor*, 699 F.2d at 830 & n.6.[8]

Petitioner also argues (Pet. 19-20) that it did not breach the maintenance of effort requirements because it "did not discharge, lay-off or reduce the hours of any of its locally-funded welfare recipients upon the creation of the supplementary CETA-funded 'workfare' program." As the court of appeals found, however, the maintenance of effort provisions require a sustained level of local funding, not simply the retention of the same individuals in locally-funded jobs. Pet. App. 21-22; see also 29 U.S.C. (1976 ed.) 845(c)(25) (requiring a grant applicant to provide "assurances that jobs funded under this subchapter are in addition to those that would be funded by the sponsor in the absence of assistance under this chapter 11"); 29 U.S.C. (1976 ed.) 983(7) (CETA program may not "result in the substitution of Federal for other funds in connection with work that would otherwise be performed"). Even though petitioner may not have transferred any PFWP participants out of that program in 1977, petitioner conceded that " 'certain CETA-eligible welfare recipients on the "[PFWP] backlog" were enrolled in the CETA-funded * * * programs' " (Pet. App. 21 (citation omitted)). This shifting of the cost of

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[8]Judge Coffey agreed with the majority that petitioner's 1976 expenditure provided the appropriate benchmark (Pet. App. 34).

Petitioner contends (Pet. 17-18) that utilizing as a benchmark the year prior to the year in which federal funds first are received by the grantee would penalize grantees who reduce expenditures for reasons unrelated to the CETA program, but that possibility exists regardless of the year that is selected as the base year. Here, as we discuss below, petitioner cannot justify its reduction in local expenditures on other grounds.

petitioner's longstanding jobs program from local revenues to the CETA program constituted a breach of the maintenance of effort requirements.

Finally, petitioner suggests (Pet. 8, 20-21) that the decrease in its 1977 PFWP budget was justified because the decrease simply reflected a reduction in the benefits paid to the program participants made possible by this Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976).[9] The court of appeals recognized, however, that petitioner originally had budgeted $4.2 million for the PFWP "in order to expand the program to 1200 positions" (Pet. App. 17), and that these budget projections took into account the lower minimum wage permitted under *National League of Cities*.[10] It was only after petitioner began to receive CETA funds in mid-1977 that petitioner deleted $2 million from its budget (*id.* at 18, 24). Thus, the court of appeals correctly concluded (*id.* at 24) that "[t]he *National League of Cities* decision may justify the wages and hours of PFWP participants in 1977, but it does not explain why the original 1977 PFWP budget of $4.2 million [which already was calculated based on the lower minimum wage] was ultimately reduced to $2 million when approximately $2 million were spent in the CETA programs in 1977." It seems clear that the reduction in funding was the result of the availability of CETA funds, not the lower wages permitted

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[9]Since the program participants were local government employees, the decision in *National League of Cities* exempted the program participants from federal minimum wage requirements.

[10]In 1977, petitioner intended to pay $2.00 per hour (a base wage permitted under *National League of Cities*) to 1200 participants for a 32-hour work week (Pet. App. 23, 123). Such payments would have totaled $3,993,600 annually, which, when added to administrative costs, amounts to the $4.2 million that petitioner originally budgeted for 1977.

under *National League of Cities.*[11] Petitioner's purported justification therefore cannot excuse its failure to comply with the maintenance of effort obligations imposed upon grant recipients under the CETA program.[12]

CONCLUSION

As to Question 1, the Court should hold the petition for a writ of certiorari and dispose of it as appropriate in light of the decision in *Brock* v. *Pierce County, supra.* In all other respects, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11] Judge Coffey did not address these facts regarding petitioner's 1977 budget in his dissenting opinion.

[12] Even assuming that petitioner's invocation of *National League of Cities* could constitute a permissible justification for the local funding decreases, that rationale explained only 71% of the shortfall in petitioner's expenditures of local funds for 1977 and 1978 (Pet. App. 23).